

No. PD-0552-18

**In the Court of Criminal Appeals
of the State of Texas**

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***Ex parte* Jordan Bartlett Jones,**
Appellant

**Brief of *Amicus Curiae* Cyber Civil Rights Initiative
In Support of the State**

*On Appeal from the Twelfth Court of Appeals
Cause No. 12-17-00346-CR*

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Cyber Civil Rights Initiative (“CCRI”) submits this brief as amicus curiae in support of the State of Texas and its defense of Section 21.16(b) of the Texas Penal Code, entitled “Unlawful Disclosure or Promotion of Intimate Visual Material.” CCRI files this brief with two purposes in mind. The first is to provide the Court with expert information on the form of privacy violation often referred to as “revenge porn” but is more accurately described as “nonconsensual pornography.” The second purpose is to offer perspective on the First Amendment issues raised by this case.

CCRI is the leading U.S.-based non-profit organization addressing the growing problem of unauthorized distribution of intimate images. Since its founding in 2013, CCRI has provided support to more than 4,000 victims of this abuse through its 24-hour crisis helpline, its collaboration with the Cyber Civil Rights Legal Project to provide pro bono services, its efforts to educate and assist legislators in drafting laws to address nonconsensual pornography, and its work with social media and technology companies to develop policies to prevent the unauthorized distribution of intimate images and other forms of online abuse.

The President and Legislative and Tech Policy Director of CCRI is Dr. Mary Anne Franks, who is a Professor of Law at the University of Miami Law School. Professor Franks is a constitutional law scholar who assisted in the drafting of the federal Intimate Privacy Protection Act introduced by Congresswoman Jackie Speier in

2016,¹ and served as the reporter for the 2018 Uniform Law Commission’s Model Civil Remedies for the Unauthorized Disclosure of Intimate Images Act. Professor Franks drafted the first model “revenge porn” law in 2013, which has been used as a template for many states that have passed legislation protecting sexual privacy.

¹ H.R. 5896, 114th Cong. (2017), *available at* <https://www.congress.gov/bill/114th-congress/house-bill/5896/text> (last visited Jan. 14, 2019).

ARGUMENT

I. Nonconsensual pornography causes devastating and often irreparable harm.

The Supreme Court of the United States insists that courts have a special obligation to apply the law carefully when it involves new technology. When courts apply “unchanging constitutional principles” to new technology or modern practices, they “should proceed with caution.”² Indeed, they “should make every effort to understand the new technology.”³ In doing so, courts “should not hastily dismiss the judgment of legislators, who may be in a better place than [courts] are to assess the implications of new technology.”⁴ While Section 21.16(b) is not a statute limited to new technology, its creation is directly related to advanced innovations in photography: in particular, the ease with which high-resolution images can be captured and distributed without consent.

Nonconsensual pornography is “the distribution of sexually graphic images of individuals without their consent.”⁵ Forty-two state legislatures have criminalized nonconsensual pornography to address the invasion of privacy this practice entails and

² *Brown v. Entm’t Merch. Ass’n*, 564 U.S. 786, 806 (2001) (Alito, J., concurring).

³ *Id.*

⁴ *Id.*

⁵ Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 346 (2014).

that causes grave and often irreparable harm to its victims.⁶

Nonconsensual pornography is not limited to images voluntarily exchanged with another person within the context of a private or confidential relationship; it also includes images that have originally been created or obtained without consent (*e.g.*, footage from hidden cameras, hacked photos, or recordings of sexual assaults). And, contrary to what the colloquialism “revenge porn” might suggest, perpetrators of nonconsensual pornography can be inspired by a range of motivations, from personal vindictiveness to greed to providing “entertainment.” Ex-partners disclose private, sexually explicit material as a means of vengeful punishment.⁷ Domestic abusers use the threat of disclosure of intimate photos to keep their partners from leaving or from reporting abuse to law enforcement.⁸ Traffickers and pimps use nonconsensual pornography to keep unwilling individuals in the sex trade.⁹ Rapists record their attacks to further humiliate their victims and to discourage them from reporting sexual

⁶ See CCRI, *42 States + DC Have Revenge Porn Laws*, available at <https://www.cybercivilrights.org/revenge-porn-laws/> (collecting state statutes) (last visited Jan. 14, 2019).

⁷ See Jack Simpson, *Revenge Porn: What is it and how widespread is the problem?* The Independent, July 2, 2014, available at <https://www.independent.co.uk/news/uk/home-news/what-is-revenge-porn-9580251.html> (last visited Jan. 14, 2019).

⁸ *Id.*; Annmarie Chiarini, *I was a victim of revenge porn*, The Guardian, Nov. 19, 2013, available at <http://www.theguardian.com/commentisfree/2013/nov/19/revenge-porn-victim-maryland-law-change> (last visited Jan. 14, 2019).

⁹ See Ann Bartow, *Pornography, Coercion, and Copyright Law 2.0*, 10 Vand. J. Ent. & Tech. L. 799, 818 (2008); Marion Brooks, *The World of Human Trafficking: One Woman's Story*, NBC Chicago, Feb. 22, 2013, available at <http://www.nbcchicago.com/investigations/human-trafficking-alex-campbell-192415731.html> (last visited Jan. 14, 2019).

assaults.¹⁰ Nursing home workers post nude photos of elderly and disabled patients to social media for amusement.¹¹ “Revenge porn” site owners traffic in unauthorized sexually explicit photos and videos to make money or to attain notoriety.¹²

No matter the motive of the perpetrator or how the images are originally obtained, their unauthorized disclosure causes immediate, devastating, and in many cases irreparable harm. Within days or even minutes, these images can dominate an internet search of the victim’s name. Images are also often sent without consent through emails, text messages, and mobile applications, in ways that directly target and reach the victim’s family, workplace, and friends. The exposure of such sensitive and private intimate images wreaks havoc on victims’ personal, professional, educational, and family life.¹³ Victims frequently experience emotional distress as well as depression, anxiety, agoraphobia, difficulty maintaining intimate relationships, and post-traumatic stress disorder.¹⁴ Some victims have been stalked, harassed, threatened with sexual assault, defamed as sexual predators, terminated from employment, expelled from their

¹⁰ Tara Culp-Ressler, *16 Year-Old’s Rape Goes Viral on Twitter*, Think Progress, July 10, 2014, *available at* <http://thinkprogress.org/health/2014/07/10/3458564/rape-viral-social-media-jada/> (last visited Jan. 14, 2019).

¹¹ See Charles Ornstein, *Nursing Home Workers Share Explicit Photos of Residents on Snapchat*, Pro Publica, Dec. 21, 2015, *available at* <https://www.propublica.org/article/nursing-home-workers-share-explicit-photos-of-residents-on-snapchat> (last visited Jan. 14, 2019).

¹² *Revenge Porn’ Website has Colorado Women Outraged*, CBS Denver, Feb. 3, 2014, *available at* <http://denver.cbslocal.com/2013/02/03/revenge-porn-website-has-colorado-woman-outraged/> (last visited Jan. 14, 2019).

¹³ See Citron & Franks, *supra* note 5, at 347.

¹⁴ Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12 *Feminist Criminology* 22, 38–39 (2017).

schools, or forced to change their names. Some victims have committed suicide.¹⁵

In addition to the trauma of having the most intimate and private details of their lives displayed to the public, and the harassment and threats they receive because of the disclosure, victims also frequently endure significant economic harm. Victims' images are often discovered by or disclosed to their employers, leading them to be fired.¹⁶ Because employers will frequently conduct online searches of the names of prospective employees, victims of nonconsensual pornography whose images turn up in search results may be unable to find jobs.¹⁷ To avoid further abuse or humiliation, victims may withdraw from online life entirely, which can be detrimental to their job prospects and careers.¹⁸ Victims often spend thousands of dollars on takedown services or online

¹⁵ Citron & Franks, *supra* note 5, at 372. See also Nina Burleigh, *Sexting, Shame and Suicide*, Rolling Stone, Sept. 17, 2013 (describing the story of 15-year-old Audrie Pott, who took her own life after a group of boys posted photos of themselves assaulting Audrie and drawing on her body with markers), available at <http://www.rollingstone.com/culture/news/sexting-shame-and-suicide-20130917> (last visited Jan. 14, 2019); BBC News Serv., *Tiziana Cantone: Suicide following years of humiliation online stuns Italy*, Sept. 16, 2016 (31-year-old Italian woman hangs herself after video of her performing a sex act goes viral), available at <http://www.bbc.com/news/world-europe-37380704> (last visited Jan. 14, 2019); Emily Bazelon, *Another Sexting Tragedy*, Slate, Apr. 12, 2013 (17-year-old Canadian girl hangs herself after photos of her being sexually assaulted at a party are circulated), available at http://www.slate.com/articles/double_x/doublex/2013/04/audrie_pott_and_rehtaeh_parsons_how_should_the_legal_system_treat_nonconsensual.html (last visited Jan. 14, 2019); Kate Briquetelet & Katie Zavadski, *Nude Snapchat Leak Drove Teen Girl to Suicide*, The Daily Beast, June 20, 2016 (15-year-old girl shoots herself in the head after ex-boyfriend posts nude photo on social media), available at <http://www.thedailybeast.com/articles/2016/06/09/leak-of-nude-snapchat-drove-teen-girl-to-suicide.html> (last visited Jan. 14, 2019).

¹⁶ See Ariel Ronneberger, *Sex, Privacy, and Webpages: Creating a Legal Remedy for Victims of Porn 2.0*, 21 Syracuse Sci. & Tech. L. Rep. 1, 8–10 (2009); see also *Warren City Bd. of Educ.*, 124 Lab. Arb. Rep. (BNA) 532, 536–37 (2007) (Skulina, Arb.) (arbitration decision upholding the termination of a teacher fired because an ex-spouse distributed nude images to co-workers and school officials).

¹⁷ See Citron & Franks, *supra*, note 5, at 352.

¹⁸ See *id.*

reputation management services in an often-futile attempt to get the damaging material removed from the internet.¹⁹ Victims who seek legal help face tens of thousands of dollars in fees pursuing judgments that, even if awarded, they may never collect.²⁰

A. The scale of the problem

CCRI researchers studied a sample of 3,044 American adults who use social media.²¹ That research shows that private, sexually explicit material is being shared in large volumes: about half of all adults age 18 to 26 have *sent* nude or seminude photographs of themselves to others, while two-thirds of adults in the same age group have *received* sexually explicit photographs of others.²² This research also shows that 1 in 8 participants had been the victims of or threatened with nonconsensual pornography. Approximately 8% reported that intimate images of them had been distributed without consent, while another 4.8% reported that someone had threatened to distribute their nude photographs without consent.²³

¹⁹ See Ian Sherr, *Forget being a victim. What to do when revenge porn strikes*, CNET, May 13, 2015 (noting that a typical case “can cost as much as \$10,000.”), available at <https://www.cnet.com/news/forget-being-a-victim-what-to-do-when-revenge-porn-strikes/> (last visited Jan. 14, 2019).

²⁰ See Tracy Clark-Flory, *Criminalizing ‘revenge porn,’* Salon, Apr. 6, 2013 (“It can cost tens of thousands before even proceeding to a judgment... Even in the case of a default judgment... These defendants are often judgment proof.”), available at https://www.salon.com/2013/04/07/criminalizing_revenge_porn/ (last visited Jan. 14, 2019).

²¹ Asia A. Eaton et al., *Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration, A Summary Report 11* (2017) (attached as an addendum to this brief).

²² *Id.* at 3–4.

²³ *Id.* at 11.

As many as 10,000 websites feature “revenge porn.”²⁴ Intimate material is also disseminated without consent through social media, blogs, emails, texts, DVDs, and photographs. Many of the thousands of websites that feature nonconsensual pornography are dedicated to this material.²⁵ These sites are popular because they provide an easily accessible, largely anonymous platform that connects profit-driven purveyors with voyeuristic consumers. These sites frequently post personal information about the victims (*e.g.*, name, age, address, employer, email address, and links to social media profiles) alongside the images, making it easy for online mobs to contact, threaten, and harass the victims.²⁶

B. Perpetrator motives and potential deterrents

The term “revenge porn,” though frequently used, is misleading. While some perpetrators weaponize intimate photographs to harm the person pictured in them, many have other motivations. Researchers have identified multiple motivations for distributing intimate photographs without the depicted person’s consent. Those range from revenge, to bragging, to arousal, to amusement. Indeed, the CCRI study found that nearly 80% of perpetrators report being motivated by something other than the

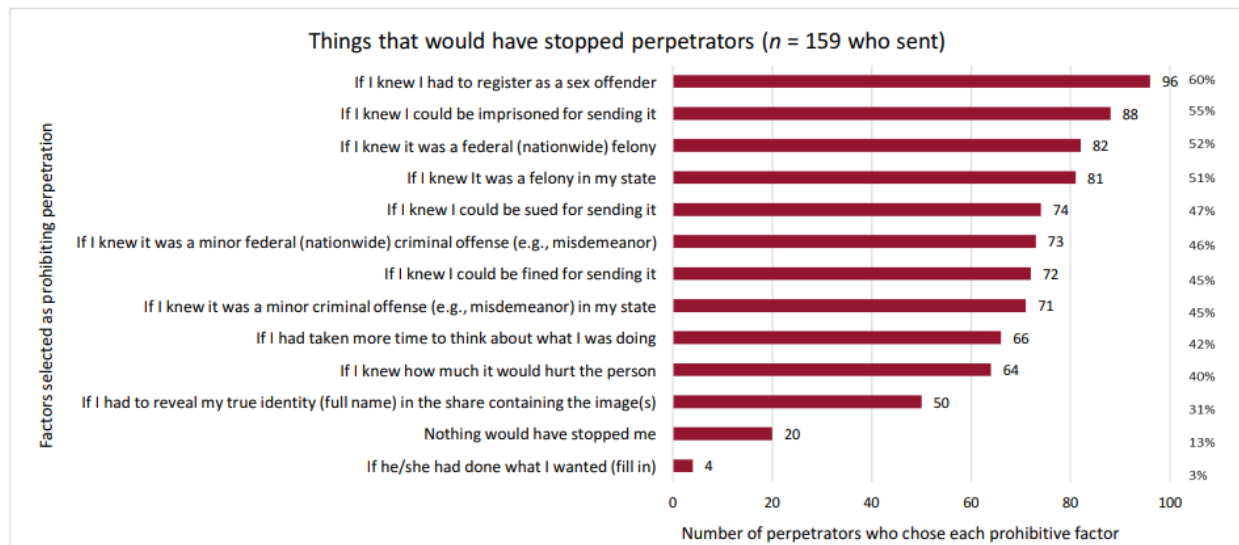
²⁴ This figure is based on takedown requests made available to CCRI.

²⁵ See *Revenge Porn: Misery Merchants*, The Economist, July 5, 2014, available at <http://www.economist.com/news/international/21606307-how-should-online-publication-explicit-images-without-their-subjects-consent-be> (last visited Jan. 14, 2019).

²⁶ See Citron & Franks, *supra* note 5, at 350–51.

desire to hurt the victim.²⁷

CCRI researchers also asked those who admitted to perpetrating nonconsensual pornography if anything would have stopped them.²⁸ Participants could choose multiple factors, and most chose five factors.²⁹ Here are the results of that question:



The most common answers relate to criminal enforcement: registration as a sex offender, imprisonment, and knowing that the nonconsensual distribution of sexually explicit materials was a felony.

C. Nonconsensual pornography disproportionately harms women and girls.

CCRI's research shows that women are more likely to be victims of this abuse, while men are more likely to be perpetrators.³⁰ The available evidence also indicates that

²⁷ CCRI, Frequently Asked Questions, <https://www.cybercivilrights.org/faqs/> (last visited Jan. 14, 2019).

²⁸ Eaton, et al., *supra* note 21, at 22.

²⁹ *Id.*

³⁰ *Id.* at 12, 15.

women and girls face more serious consequences as a result of their victimization.³¹ “Revenge porn” websites feature far more women than men, and the majority of court cases and news stories about the behavior to date involve female victims and male perpetrators.³² Nonconsensual pornography often plays a role in other crimes that disproportionately affect women, including intimate partner violence, sexual abuse of minors, sexual assault, and sex trafficking. And, the disclosure of intimate images, or the threat of such disclosure, is often used to punish and discourage outspoken or successful women.³³

D. The harm: examples

Nonconsensual pornography turns the most private and intimate moments of a person’s life into sexual entertainment for strangers. Once uploaded onto the web, these images are viewable by thousands, even millions, of people. In just a few days, search

³¹ Citron & Franks, *supra* note 5, at 353–54.

³² See Anastasia Powell et al., *The Picture of Who Is Affected by ‘Revenge Porn’ Is More Complex Than We First Thought*, Conversation, May 7, 2017 (noting that “there are many more sites and platforms dedicated to sharing women’s nude or sexual images without their consent than men’s”), *available at* <https://theconversation.com/the-picture-of-who-is-affected-by-revenge-porn-is-more-complex-than-we-first-thought-77155> (last visited Jan. 14, 2019); *see also* Abby Whitmarsh, *Analysis of 28 Days of Data Scraped from a Revenge Pornography Website*, WordPress.com, Apr. 13, 2015 (finding that of 396 posts to a revenge porn website, 378 depicted women versus 18 men), *available at* <https://everlastingstudent.wordpress.com/2015/04/13/analysis-of-28-days-of-data-scraped-from-a-revenge-pornography-website/> (last visited Jan. 14, 2019); Data & Soc’y Research Inst., *Nonconsensual Image Sharing: One in 25 Americans Has Been a Victim of “Revenge Porn”* at 5 (2016) (finding that one in ten women under the age of thirty had been threatened with disclosure of intimate images), *available at* https://datasociety.net/pubs/oh/Nonconsensual_Image_Sharing_2016.pdf (last visited Jan. 14, 2019).

³³ Emma Gray, *The Emma Watson Threats Were A Hoax, But Women Face Similar Intimidation Online Every Day*, Huffington Post, Sept. 26, 2014, *available at* https://www.huffingtonpost.com/2014/09/26/emma-watson-hoax-women-online-threats_n_5887712.html (last visited Jan. 14, 2019).

engines will “hit” on those images anytime someone searches a victim’s name. Intimate images can also be sent to family members, employers, co-workers, and peers. Given the breadth of the exposure, nonconsensual pornography harms victims in dramatic ways. Below are a few examples of how these crimes have affected fellow Texans.

- In 2012, Hollie Touns of Nederland, Texas, received a phone call from a friend telling her that nude photos of her were posted on a website called Texxxan.com. When Touns visited the site, she found intimate photos of herself that were linked to a map that pinpointed her home address, her Facebook page, and list of other photos.³⁴ In her small community, Touns found herself being recognized by men who would reference the photos or proposition her as she went about her daily tasks. When she contacted the website to have the photos removed, the site’s proprietors demanded payment. Touns refused the extortionate demand and initiated a lawsuit against the site that was eventually joined by dozens of other women, including two allegedly underage victims.³⁵ These women’s experiences helped propel the efforts of Texas legislators to address the problem, efforts which culminated in the passage of Section 21.16(b).³⁶
- When a San Antonio woman wanted out of her marriage, her husband Jorge Luis posted an intimate video of her on YouPorn, a commercial pornography website. The uploaded video consisted of a video chat—recorded without her knowledge—in which she is topless.³⁷

³⁴ Eric Larson, *It's Still Easy to Get Away With Revenge Porn*, Mashable, Oct. 21, 2013, *available at* <https://mashable.com/2013/10/21/revenge-porn/> (last visited Jan. 14, 2019).

³⁵ Jessica Roy, *Two Alleged Underage Victims Sign Onto Revenge Porn Lawsuit Against Texxxan.com and GoDaddy*, Observer, Feb. 11, 2013, *available at* <https://observer.com/2013/02/two-alleged-underage-victims-sign-onto-revenge-porn-lawsuit-against-texxxan-com-and-godaddy/> (last visited Jan. 14, 2019).

³⁶ Eric Besson, *New state law gives power to revenge porn victims*, Beaumont Enterprise, Sept. 1, 2015, *available at* <https://www.beaumontenterprise.com/news/article/New-state-law-gives-power-to-revenge-porn-victims-6478166.php> (last visited Jan. 14, 2019).

³⁷ Caleb Downs, *Man Posted revenge porn of wife to YouPorn after she learned he was married to 2nd Woman*, San Antonio Express News, Nov. 9, 2017, *available at* <https://www.mysanantonio.com/news/local/crime/article/SAPD-Man-posted-revenge-porn-of-wife-to-YouPorn-12344403.php> (last visited Jan. 14, 2019).

- About a week after Megan Reid broke up with her boyfriend, men started calling her house asking to have sex with her. Reid later learned that her ex-boyfriend had created a page on the online classifieds site Craigslist.com with her nude photographs and ad copy suggesting she was looking for sex. Reid was living with her parents at the time and worried about the safety of her family.³⁸
- Adrian Romo assaulted his girlfriend several times and once stole her car with her children inside. After she filed domestic violence reports with the police and ended the relationship, Romo sent the woman threatening messages, saying he would disclose nude photographs of her if she did not return his phone calls. He eventually sent the photos to the woman's husband and her husband's family members.³⁹
- Jada was 16 years old when she discovered that a photograph of her, naked and unconscious at a party, had been posted online. This was how Jada learned that she had been sexually assaulted at the party, where Jada believes her drink had been spiked. The photograph went "viral": social media users began sharing photos of themselves lying on the floor with one leg bent back, the position in which Jada's unconscious body was pictured, using the hashtag #JadaPose.⁴⁰ One of the alleged perpetrators wrote tweets mocking her following the assault. Jada spoke out against the abuse of her image and the exploitation of her sexual assault, telling a Texas news station, "There's no point in hiding...Everybody has already seen my face and my body, but that's not what I am and who I am."⁴¹

Courageous victims and advocates have educated lawmakers about the grievous harm suffered by victims of nonconsensual pornography, prompting a strong legislative

³⁸ Sophie Inge, *Texas revenge porn victim, 28, whose ex 'put nude pictures of her on fake social media accounts' starts support group to help other sufferers*, Daily Mail, Nov. 24, 2017, [available at https://www.dailymail.co.uk/news/article-5113751/Texas-revenge-porn-victim-starts-support-group.html](https://www.dailymail.co.uk/news/article-5113751/Texas-revenge-porn-victim-starts-support-group.html) (last visited Jan. 14, 2019).

³⁹ Caleb Downs, *Man sent revenge porn to family of Olmos Park woman's husband*, mySanAntonio.com, Sept. 5, 2017, [available at https://www.mysanantonio.com/news/local/crime/article/Suspect-sent-revenge-porn-to-family-of-woman-s-12173537.php](https://www.mysanantonio.com/news/local/crime/article/Suspect-sent-revenge-porn-to-family-of-woman-s-12173537.php) (last visited Jan. 14, 2019).

⁴⁰ Laura Bates, *#JadaPose: the online ridiculing of a teen victim is part of a sickening trend*, The Guardian, July 17, 2014, [available at https://www.theguardian.com/lifeandstyle/womens-blog/2014/jul/17/jadapose-online-ridiculing-rape-victims-sickening-trend](https://www.theguardian.com/lifeandstyle/womens-blog/2014/jul/17/jadapose-online-ridiculing-rape-victims-sickening-trend) (last visited Jan. 14, 2019).

⁴¹ Angelica Leicht, *Suspects Arrested, Charged in #Jadapose Rape Case*, Houston Press, Dec. 17, 2014, [available at https://www.houstonpress.com/news/suspects-arrested-charged-in-jadapose-rape-case-6744287](https://www.houstonpress.com/news/suspects-arrested-charged-in-jadapose-rape-case-6744287) (last visited Jan. 14, 2019).

response. As of December 15, 2018, 42 states and Washington D.C. have passed laws criminalizing the practice, and bipartisan federal legislation on the issue is pending in Congress.⁴²

II. This Court should uphold Section 21.16(b) as a privacy regulation that responds to the serious harm of nonconsensual pornography without violating the First Amendment.

Simply put, there is no First Amendment right to invade a person’s privacy by distributing private, intimate images of him without authorization.⁴³ Section 21.16(b) is a straightforward privacy regulation, and as such, should be subjected to no more scrutiny than laws prohibiting the unauthorized disclosure of other forms of private information, such as medical records, trade secrets, social security numbers, or drivers’ license information.

Even if the statute is analyzed under strict scrutiny, however, it should survive because it is narrowly drawn and targeted at a compelling government interest. As the Vermont Supreme Court stated when it upheld that state’s similar nonconsensual pornography law under strict scrutiny, “United States legal history supports the notion that states can regulate expression that invades individual privacy without running afoul

⁴² See Intimate Privacy Protection Act, *supra* note 1; Ending Nonconsensual Online User Graphic Harassment (“ENOUGH”) Act, S. 21262, 115th Cong. (2017), *available at* <https://www.congress.gov/bill/115th-congress/senate-bill/2162/text> (last visited Jan. 14, 2019).

⁴³ See *United States v. Osinger*, 753 F.3d 939, 948 (9th Cir. 2014) (concluding that unauthorized “sexually explicit publications concerning a private individual” are not “afforded First Amendment protection” when examined in the context of an anti-stalking prohibition); *United States v. Petrovic*, 701 F.3d 849, 855–56 (8th Cir. 2012) (distributing a victim’s private nude photos without consent “may be proscribed consistent with the First Amendment”).

of the First Amendment.”⁴⁴ This Court should uphold the constitutionality of Section 21.16(b) because the statute is tailored to prevent the serious privacy harm caused by nonconsensual pornography, and does so without treading on the core values protected by the First Amendment.

A. There is no First Amendment right to invade a person’s privacy by distributing private, intimate images without authorization.

Like other privacy laws, Section 21.16(b) is concerned with the unauthorized disclosure of private information. Various state and federal laws protect the right of individuals to keep a wide array of private information out of the public eye, including medical records, trade secrets, social security numbers, student educational records, drivers’ license information, genetic information, biometric data, geolocation data, even video rental information.⁴⁵ Some of these laws are very broad in scope; some impose serious criminal as well as civil penalties; and some permit the imposition of liability based on negligence as well as recklessness, knowledge, and purpose.

⁴⁴ *State v. VanBuren*, 2018 VT 95, ¶31 (2018).

⁴⁵ “On the statutory side of the law, there is a panoply of federal and state statutes that limit disclosures of personal data. A number of federal statutes restrict disclosure of information from school records, cable company records, video rental records, motor vehicle records, and health records. . . . Various states have also restricted the disclosure of particular forms of information, such as data about health, alcohol and drug abuse, sexual offense victims, HIV status, abortion patients, and mental illness.” Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 967, 971–72 (2003) (internal citations omitted).

Despite this, the vast majority of privacy laws have never been seriously challenged on First Amendment or other constitutional grounds.⁴⁶ The U.S. Supreme Court has never struck down a law for restricting disclosures of information relating to matters of purely private concern.⁴⁷ As the eminent constitutional law scholar Erwin Chemerinsky has written, “The First Amendment does not protect a right to invade a person’s privacy by publicizing, without consent, nude photographs or videos of sexual activity.”⁴⁸

B. The statute is subject at most to intermediate scrutiny, which it easily satisfies.

The court below was wrong to categorize the law as a content-based restriction that triggers “strict scrutiny” analysis, the most exacting level of review. The court reasoned that the law discriminated on the basis of content by not prohibiting all intentional disclosures of images of other people, but only sexually explicit ones. By that logic, every law that singles out certain kinds of information for special protection is also content-based in a way that offends the First Amendment. This would mean that virtually every privacy law ever written—from those that protect medical records to Social Security numbers to driver’s license information—is presumptively invalid. The

⁴⁶ “[P]rivacy and speech have coexisted harmoniously throughout the overwhelming majority of nondisclosure rules, which have never raised constitutional issues.” Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. Rev. 149, 1199–200 (2005).

⁴⁷ *Id.*

⁴⁸ Office of Congresswoman Jackie Speier, *Press Release: Congresswoman Speier, Fellow Members of Congress Take on Nonconsensual Pornography, AKA Revenge Porn*, July 14, 2016, <https://speier.house.gov/media-center/press-releases/congresswoman-speier-fellow-members-congress-take-nonconsensual>.

entire body of privacy law is built on the recognition that some kinds of information are more sensitive than others and that disclosures of such information can and should be regulated. That is precisely what the Texas law does: it regulates, not prohibits, the intentional disclosure of a certain kind of private information. A person can disclose all the sexually explicit images of another person he likes, so long as he gets consent to do so.

The Supreme Court has “long recognized that not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection,” whereas “speech on matters of purely private concern is of less First Amendment concern.”⁴⁹ Sexually explicit images intended either for no one’s viewing or only for viewing by an intimate partner is a matter of purely private concern. Prohibiting the nonconsensual disclosure of those images poses “no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship on matters of public import.”⁵⁰

⁴⁹ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (internal citations omitted); see also *Connick v. Myers*, 461 U.S. 138, 147 (1983) (holding that “when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior”).

⁵⁰ *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (cleaned up) (suggesting that a matter is “purely private” if it does not contribute to “the free and robust debate of public issues” or the “meaningful dialogue of ideas”).

Generally speaking, it “is true enough that content-based regulations of speech are presumptively invalid.”⁵¹ The U.S. Supreme Court has recognized, however, that “[t]he rationale of the general prohibition . . . is that content discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”⁵² There are “numerous situations in which that risk is inconsequential, so that strict scrutiny is unwarranted.”⁵³

As relevant here, strict scrutiny should not be applied to legal protections against the unauthorized disclosure of matters of private concern. The First Amendment’s limits on state action are “often less rigorous” in matters of purely private significance.⁵⁴ That is truer still when the government seeks to protect against unauthorized disclosure of private information, not because of any disagreement with message or viewpoint conveyed by the disclosure, but because “[p]rivacy of communication” is itself “an important interest.”⁵⁵ The core value of privacy has constitutional underpinnings that reflect the critical importance of allowing people to shield their most intimate and

⁵¹ *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007); see also *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

⁵² *Davenport*, 551 U.S. at 188 (cleaned up).

⁵³ *Id.*

⁵⁴ *Snyder*, 562 U.S. at 452.

⁵⁵ *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001).

private experiences from public scrutiny.⁵⁶

The high social value placed on privacy is further illustrated by scores of state and federal laws prohibiting the unauthorized distribution of private information—from trade secrets to medical records—that have never been deemed unconstitutional or even challenged on constitutional grounds.⁵⁷ When such laws have been challenged, courts generally apply intermediate, rather than strict scrutiny to evaluate their constitutionality.⁵⁸ “[W]hen purely private matters are the subject at hand, free speech protections are less rigorous because such matters do not implicate the same constitutional concerns as limiting matters of public interest.”⁵⁹

The U.S. Supreme Court has also endorsed a reduced level of scrutiny for the regulation of sexually explicit material. As the Court has explained, even when sexually explicit material does not rise to the level of obscenity,⁶⁰ the First Amendment offers such speech protection “of a wholly different, and lesser magnitude” than the

⁵⁶ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (describing privacy interests protected by Due Process Clause).

⁵⁷ See Daniel Solove, *A Brief History of Information Privacy Law*, Proskauer on Privacy Law (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=914271 (last visited Jan. 14, 2019).

⁵⁸ See, e.g., *Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 949–52 (7th Cir. 2015) (applying intermediate scrutiny to reject a First Amendment challenge to a federal statute criminalizing the disclosure of personal information from motor vehicle records).

⁵⁹ *State v. Culver*, 918 N.W.2d 103, 110–11 (Wis. App. 2018) (upholding Wisconsin’s nonconsensual pornography law against First Amendment challenge) (internal citations omitted).

⁶⁰ As the State explains in its opening brief, nonconsensual pornography may be proscribed as obscenity, and Section 21.16(b) is a constitutionally permissible approach to doing so. State’s Br. 12–17. One of our purposes here is to show that, even if this Court concludes that nonconsensual pornography does not qualify as obscene, Section 21.16(b) remains constitutional under the standards applied to the secondary effects of non-obscene sexually explicit material.

protection it offers “political debate.”⁶¹ More specifically, when reviewing laws that address the secondary effects of sexually explicit material, courts have routinely applied intermediate scrutiny and upheld restrictions on these materials, provided the restrictions are designed to serve a substantial government interest, are narrowly tailored to serve that interest, and do not unreasonably limit alternative avenues of communication.⁶²

Section 21.16(b)’s restriction on the unauthorized disclosure of private, sexually explicit images treads in territory far removed from the core concerns of the First Amendment. Respondent’s conduct—posting nude photos of the victim without consent—should not receive the full measure of the First Amendment’s protection. Rather, this Court should have “no difficulty in concluding” the distribution of homemade sexually explicit material “does not qualify as a matter of public concern under any view.”⁶³ As our Supreme Court has explained, “there is a presumption under Texas law that the public has no legitimate interest in private embarrassing facts about private citizens.”⁶⁴ Prohibiting the nonconsensual disclosure of intimate images therefore poses “no threat to the free and robust debate of public issues; there is no

⁶¹ *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976).

⁶² See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-50, 54 (1986) (upholding a zoning ordinance restricting the location of adult theaters); *Vivid Entm’t, LLC v. Fielding*, 774 F.3d 566, 580 (9th Cir. 2014) (same with regard to a measure requiring male performers in adult films to wear condoms); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 828 (7th Cir. 1999) (same with regard to an ordinance limiting the hours of operation for adult bookstores).

⁶³ *San Diego v. Roe*, 543 U.S. 77, 84 (2004).

⁶⁴ *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474 (Tex. 1995).

potential interference with a meaningful dialogue of ideas.”⁶⁵

U.S. Supreme Court precedent should not be construed to mandate the most searching scrutiny of statutes that protect victims from nonconsensual publication of these deeply private images. Certainly, the high Court has signaled its commitment to vigorous enforcement of the First Amendment’s free speech guarantee.⁶⁶ The Supreme Court has not, however, considered a statute like Section 21.16(b), nor has it grappled with the grievous harm caused by nonconsensual pornography. The publication of nude or sexually explicit pictures of a person without the person’s consent is not a part of our nation’s historical traditions.⁶⁷ The dissemination of these intimate and private images without consent conflicts with other rights engrained in our constitutional traditions—rights *not* to speak and to maintain one’s privacy (including bodily privacy) against unwarranted intrusions.⁶⁸

Accordingly, assuming some degree of constitutional scrutiny of Section 21.16(b)

⁶⁵ *Snyder*, 562 U.S. at 452 (cleaned up).

⁶⁶ *See, e.g., Reed*, 135 S. Ct. at 2228 (“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech.”) (quotation omitted); *see also Brown*, 564 U.S. at 804 (holding unconstitutional California’s ban on selling violent video games to minors); *United States v. Stevens*, 559 U.S. 460, 482 (2010) (holding unconstitutional federal statute banning depictions of animal cruelty).

⁶⁷ *Cf. Brown*, 564 U.S. at 792 (observing that legislative restrictions on speech must be consistent with long tradition of proscription).

⁶⁸ *Cf. Lawrence*, 539 U.S. at 567 (describing sexual conduct as “the most private human behavior”); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”).

is required,⁶⁹ the proper standard would be intermediate review. After all, Section 21.16(b)'s prohibition on distributing sexually explicit images of individuals without their consent does not implicate any concern that the government is trying to inhibit debate on issues of public concern or “drive certain ideas or viewpoints from the marketplace.”⁷⁰ On the contrary, Section 21.16(b) is aimed at the protection of highly personal private information and the prevention of harmful secondary effects—including financial, reputational, and emotional injuries—that predictably attend the disclosure of sexually explicit depictions of individuals without their consent.⁷¹ The standard of intermediate scrutiny provides sufficient protection for any First Amendment interests at stake.

The ultimate inquiry under intermediate scrutiny is “one of reasonableness,” which Section 21.16(b) satisfies easily.⁷² That is, Respondent's First Amendment challenge should fail because Section 21.16(b) promotes a substantial government

⁶⁹ Noted First Amendment scholar Frederick Schauer has observed that many content-based regulations do not trigger First Amendment scrutiny at all: “the content-based restrictions of speech in the Securities Act of 1933, the Sherman Antitrust Act, the National Labor Relations Act, the Uniform Commercial Code, the law of fraud, conspiracy law, the law of evidence, and countless other areas of statutory and common law do not, at the least, present serious First Amendment issues.” Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1768 (2004).

⁷⁰ *Davenport*, 551 U.S. at 188 (cleaned up).

⁷¹ See *Dahlstrom*, 777 F.3d at 949–52 (applying intermediate scrutiny to restrictions on the disclosure of personal information); *Vivid Entm't*, 774 F.3d at 580–81 (applying intermediate scrutiny to restrictions directed at the secondary effects of sexually explicit depictions).

⁷² *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 439–41 (6th Cir. 1998).

interest, is narrowly tailored, and does not unreasonably limit alternative avenues of communication.⁷³

C. Even if the statute were subjected to strict scrutiny, it would survive because it is narrowly tailored to address compelling government interests.

Even if the Court applies strict scrutiny, the Court should uphold Section 21.16(b) because it is narrowly tailored to address compelling government interests.

1. The governmental interests served by Section 21.16(b) are not only significant, but compelling.

Most obviously, Section 21.16(b) seeks to vindicate the government’s interest in preventing the real-life harms of nonconsensual pornography. As the U.S. Supreme Court observed more than a century ago, “[t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow,” and to “compel any one . . . to lay bare the body . . . without lawful authority, is an indignity, an assault, and a trespass.”⁷⁴ Laws regarding surveillance, voyeurism, and child pornography demonstrate the legal and social recognition of the harm caused by the unauthorized viewing of one’s body. These laws rest on the commonly accepted assumption that observing a person in a state of undress or engaged in sexual activity without that person’s consent not only inflicts dignitary harms upon the individual observed, but

⁷³ See *City of Renton*, 475 U.S. at 47–50.

⁷⁴ *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 252 (1891).

inflicts a social harm serious enough to warrant criminal prohibition and punishment.⁷⁵

We have already described in the pages above the many ways in which victims of nonconsensual pornography suffer, from the trauma and humiliation of having the most intimate and private details of their lives placed on display to job loss, severe harassment and threats, and serious reputational harm. There should be little question that preventing these harms is a legitimate as well as compelling governmental interest.

Even in the absence of actual harm, Section 21.16(b) also protects personal privacy, which is an important governmental interest in its own right.⁷⁶ As a Wisconsin appellate court held recently in upholding that state’s nonconsensual pornography law against First Amendment challenge:

In prohibiting the knowing publication of intentionally private depictions of another person who is either nude, partially nude, or engaged in sexually explicit conduct, the statute serves to protect an important state interest—individual privacy. No one can challenge a state’s interest in protecting the privacy of personal images of one’s body that are intended to be private—and specifically, protecting individuals from the nonconsensual publication on websites accessible by the public.⁷⁷

Privacy is also instrumental in fostering the relationships and values that are crucial in an open society. People rely on the confidentiality of transactions in other contexts all the time: they trust doctors with sensitive health information; salespeople

⁷⁵ National District Attorneys Association, *Voyeurism Statutes 2009*, available at <https://ndaa.org/wp-content/uploads/Voyeurism-2010.pdf> (last visited Jan. 14, 2019).

⁷⁶ See *Bartnicki* 532 U.S. at 532–33.

⁷⁷ *Culver*, 918 N.W.2d at 110; see also *People v. Iniguez*, 202 Cal. Rptr. 3d 237, 243 (Cal. App. 2016) (government has an “important interest in protecting the substantial privacy interests of individuals from being invaded . . . through the distribution of photos of their intimate body parts”).

with credit card numbers; lawyers with their closely guarded secrets. They are able to rely on the confidentiality of these transactions because society takes it as a given that consent to share information is limited by context. That intuition is backed up by the law, which recognizes that violations of contextual consent can and should be punished. Both federal and state criminal laws punish unauthorized disclosures of financial, medical, and business information.⁷⁸ It would be remarkable to suggest that the protection of a private individual's sexual information against unauthorized disclosure is entitled to any less respect.

Further, by protecting Texans against the disclosure of intimately private images without their consent, Section 21.16(b) advances the government's interest in safeguarding important aspects of speech and expression. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"⁷⁹ Although privacy laws do, in some sense, restrict speech, they also "directly enhance private speech" because their "assurance of privacy helps to overcome our natural reluctance" to communicate freely on private matters out of fear that those communications "may become public."⁸⁰ This is particularly true when the potential threat of dissemination is "widespread," as it is with images that can be shared

⁷⁸ See, e.g., 18 U.S.C. §1832(a)(2) (criminalizing the unauthorized disclosure of trade secrets); 18 U.S.C. §§2721–25 (imposing criminal fines for unauthorized disclosure of personal and other information obtained in connection with a motor vehicle record); 42 U.S.C. §1320d-6(a)(3) (criminalizing unauthorized disclosure of individually identifiable health information).

⁷⁹ *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995).

⁸⁰ *Bartnicki*, 532 U.S. at 537 (Breyer, J., concurring).

over the internet.⁸¹ The fear that private, intimate information might be exposed to the public discourages individuals from engaging not only in erotic expression, but also from other kinds of expressive conduct. Many victims report that they withdraw from their professional, romantic, familial, educational, and social media activities in the wake of the exposure of their intimate information or in the fear that such information might be exposed.

To suggest that none of these is a compelling governmental interest would cast into doubt many widely accepted legal restrictions for the protection of privacy. For example, accepting Respondent's argument would immediately call into question the validity of state restrictions on disclosing private medical information,⁸² criminal prohibitions on the use of nonpublic information by government employees,⁸³ restrictions on the unauthorized disclosure of biometric identifiers like fingerprint or retinal scan information,⁸⁴ and common-law protections against public disclosure of private facts.⁸⁵ As such, this Court should recognize that protecting a person's bodily privacy and right to consent to disclosure of nude and sexually explicit pictures is a compelling government interest.

⁸¹ *Id.*

⁸² Tex. Health & Safety Code §181.201.

⁸³ Tex. Penal Code §39.06.

⁸⁴ Tex. Bus. & Com. Code §503.001.

⁸⁵ See *Indus. Found. of the South v. Tex. Indus. Acc. Bd.*, 540 S.W.2d 668, 682 (Tex. 1976).

2. Under any level of scrutiny, Section 21.16(b) is narrowly tailored to advance its purposes.

Section 21.16(b) is narrowly drawn to protect the fundamental right to privacy without infringing upon freedom of speech. It prohibits only the intentional disclosure of sexually explicit visual material without the effective consent of the depicted person, and only when the visual material was obtained by the person or created under circumstances in which the depicted person had a reasonable expectation that the visual material would remain private. The statute's reach is further narrowed to situations in which the disclosure of the visual material both causes harm to the depicted person and reveals the identity of the depicted person.

The court below found the statute overly broad because it does not require the defendant to know that the depicted person had a reasonable expectation that the image would remain private or that the defendant intended to harm the victim. In order to illustrate the supposedly “alarming breadth” of the statute, the court resorted to a contrived hypothetical rather than addressing the actual facts of the instant case.⁸⁶

That the court had to create an elaborate fictional scenario to demonstrate the statute's supposed overbreadth, rather than being able to point to a single actual case providing evidence of it, is a strong indication that this broad interpretation poses no

⁸⁶ *Ex parte Jones*, No. 12-17-00346-CR, 2018 WL 2228888, at *5 (Tex. App.—Tyler May 16, 2018) (presenting a hypothetical scenario in which a man emails a topless photo of his former intimate partner “without comment to several of his friends,” one of whom forwards the photo to another person who happens to be the woman's co-worker, who in turn shows the photo to the woman's employer, who then fires the woman), *petition for discretionary review granted* (July 25, 2018).

“realistic” and “substantial” danger, “judged in relation to the statute’s plainly legitimate sweep.”⁸⁷ As noted above, forty-two states and the District of Columbia have criminal laws against this conduct—the oldest dates back to 2003—and Texas’s has been in effect since 2015. Yet neither the court, Respondent, nor amici could find even one real case illustrating the “alarming breadth” of any nonconsensual pornography law, to say nothing of Texas’s in particular. This strongly suggests that any potential overbreadth in the statute is more hypothetical than real, and could readily be addressed through narrowing constructions. While no statute will “satisfy those intent on finding fault at any cost,”⁸⁸ the Constitution does not require the satisfaction of an impossible standard. The First Amendment requires that statutes be narrowly tailored, not “perfectly tailored.”⁸⁹

The court below, Respondent, and amici all suggest that the statute is flawed because it does not make the intent to cause harm an element of the crime.⁹⁰ But they offer no justification for why identical conduct causing identical harm should be treated differently based solely on the interior thoughts of the actors. As noted above, the majority of people who disclose private, sexually explicit images without consent do so with motivations other than intent to harm the victim. Examples include the operators

⁸⁷ *New York v. Ferber*, 458 U.S. 747, 770 (1982).

⁸⁸ *U.S. Civil Serv. Comm’n v. Letter Carriers*, 413 U.S. 548, 579 (1973).

⁸⁹ *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1671 (2015) (quoting *Burson v. Freeman*, 504 U.S. 191 (1992)).

⁹⁰ *Ex parte Jones*, 2018 WL 2228888, at *7.

of “revenge porn” sites like Texxxxan;⁹¹ male Marines in a closed Facebook group exchanging hundreds of nude and sexually explicit photos of female Marines without their knowledge or consent;⁹² California law enforcement officers passing around intimate pictures of female arrestees as a “game;”⁹³ and fraternity brothers uploading photos of unconscious, naked women to a members-only Facebook page for entertainment purposes.⁹⁴

For that very reason, several state laws criminalizing nonconsensual pornography law on the books do not include such motive elements.⁹⁵ Neither does the 2018 Uniform Law Commission’s Civil Remedies for the Unauthorized Disclosure of Intimate Images Act,⁹⁶ the recent amendment to the Uniform Code of Military Justice addressing nonconsensual pornography,⁹⁷ nor the proposed bipartisan federal criminal

⁹¹ James Fletcher, *The Revenge Porn Avengers*, BBC, Dec. 3, 2013, available at <https://www.bbc.com/news/magazine-25321301> (last visited Jan. 14, 2019).

⁹² Katie Van Syckle, *How Two Marines Helped Bring Down Revenge Porn on Facebook*, Rolling Stone, May 5, 2017, available at <http://www.rollingstone.com/culture/features/facebook-revenge-porn-how-two-marines-helped-stop-it-w478930> (last visited Jan. 14, 2019).

⁹³ Matthias Gafni & Malaika Fraley, *Warrant: CHP officer says stealing nude photos from female arrestees ‘game’ for cops*, Contra Costa Times, Oct. 24, 2014, available at http://www.contracostatimes.com/my-town/ci_26793090/warrant-chp-officer-says-stealing-nude-photos-from (last visited Jan. 14, 2019).

⁹⁴ Holly Otterbein, *Member of Penn State’s Kappa Delta Rho Defends Fraternity*, Philadelphia, Mar. 18, 2015, available at <http://www.phillymag.com/news/2015/03/18/member-of-penn-states-kappa-delta-rho-defends-fraternity/> (last visited Jan. 14, 2019).

⁹⁵ See, e.g., 720 Ill. Comp. Stat. 5/11-23.5; Minn. Stat. §617.261; Wash. Rev. Code §9A.86.010.

⁹⁶ <https://www.uniformlaws.org/committees/community-home?CommunityKey=668f6afa-f7b5-444b-9f0a-6873fb617ebb> (last visited Jan. 14, 2019).

⁹⁷ Protecting the Rights of Individuals Against Technological Exploitation (“PRIVATE”) Act, Pub.L. 115-91, 131 Stat. 1389 (2017) (codified at 10 U.S.C. §917a).

legislation against nonconsensual pornography.⁹⁸

Because the harm of nonconsensual pornography is unaffected by the motive of the perpetrator, a narrowly tailored law need not include an intent-to-harm element. As a Wisconsin appellate court observed in upholding that state's nonconsensual pornography law against a First Amendment challenge:

Although the requirement of wrongful intent would have a limiting effect on a statute, the breadth of a statute can be effectively limited or curtailed through a variety of other criteria, elements, and conditions. . . . A wrongful intent is inherent in the act of publishing a profoundly personal image intended to be and known to be private and without consent. Adding an express intent to harm element would hardly, if at all, reduce the scope of the statute.⁹⁹

According to Professor Chemerinsky, the view that liability for nonconsensual pornography laws must be limited to those who intend to cause harm to the victim, is simply wrong:

I don't see anything in the First Amendment that says there has to be an intent to cause harm to the victim. If the material is intentionally or recklessly made publicly available, I think that is sufficient, and I don't think it should just be about intent to cause harm to the victim. Imagine that the person is putting the material online for profit or personal gain. That should be just as objectionable as to cause harm to the victim.¹⁰⁰

⁹⁸ ENOUGH Act of 2017, *supra* note 42.

⁹⁹ *Culver*, 918 N.W.2d at 111; *see also* Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 U.C.L.A. L. Rev. 1366, 1405–06 (2016) (explaining that narrow restrictions on nonconsensual pornography are justifiable and need not be limited to circumstances where the disclosure is intended to harm the victim).

¹⁰⁰ CCRI, Professor Erwin Chemerinsky and Expert Panelists Support Bipartisan Federal Bill Against Nonconsensual Pornography, Cyber Civil Rights Initiative, Oct. 6, 2017, *available at* <https://www.cybercivilrights.org/2017-cybercrime-symposium/> (last visited on Jan. 14, 2019).

Echoing this view, the renowned First Amendment scholar Eugene Volokh has written that “[r]evenge porn is bad because it’s nonconsensual—at least one of the participants didn’t agree to the distribution of the material—and not because its purpose is revenge. The label ‘revenge porn’ stuck because it’s vivid, and because most nonconsensual porn probably is motivated by revenge. But for purposes of legal analysis, there’s no reason to limit the category to nonconsensual porn posted with the purpose of distressing the depicted person.”¹⁰¹

Not only is there no doctrinal basis for the assertion that the inclusion of a motive requirement is needed to ensure a law’s constitutionality, but the opposite may be true. Prohibiting the dissemination of private, sexually explicit images for the purpose of harming the person depicted while allowing the same act to be committed for other purposes makes the law vulnerable to First Amendment challenges on vagueness, underinclusiveness, and viewpoint discrimination grounds. This Court has noted that intent elements can “exacerbate[] the First Amendment concerns.”¹⁰² In striking down Texas’s improper photography law, which required defendants to act with “the intent to arouse or gratify the sexual desire of any person,”¹⁰³ this Court pointed to *Texas v. Johnson*, where the Supreme Court found that Texas’s flag-burning statute “was content based because it punished mistreatment of the flag that was

¹⁰¹ Volokh, *supra* note 99 at 1405–06.

¹⁰² *Ex parte Thompson*, 442 S.W.3d 325, 337–38 (Tex. Crim. App. 2014).

¹⁰³ Tex. Penal Code §21.15(b)(1) (2015).

intentionally designed to seriously offend other individuals.”¹⁰⁴ Cyberbullying laws in North Carolina and New York that included motive requirements have been struck down on the grounds that phrases such as harass, torment, and embarrass are unconstitutionally vague.¹⁰⁵

As a final matter, Section 21.16(b) is tailored to survive constitutional scrutiny because it does not amount to a complete ban on expression.¹⁰⁶ Texans remain free to produce, distribute, and consume a vast array of consensually disclosed sexually explicit images.¹⁰⁷ Where the provenance of a sexually explicit image is in doubt, would-be disclosers always have the option of seeking authorization, as is standard practice by photographers¹⁰⁸ and required in many cases by copyright law.¹⁰⁹ Moreover, Texans remain free to criticize or complain about private citizens in ways that do not violate the privacy rights of others. The narrowly tailored prohibition in Section 21.16(b) does

¹⁰⁴ *Ex parte Thompson*, 442 S.W.3d at 347 (quoting *Texas v. Johnson*, 491 U.S. 397, 411 n.7 (1989)).

¹⁰⁵ *State v. Bishop*, 787 S.E.2d 814, 821 (N.C. 2016) (striking down on First Amendment grounds statute that “prohibits anyone from posting forbidden content with the intent to ‘intimidate or torment’ a minor”); *People v. Marquan M.*, 19 N.E.3d 480, 486 (N.Y. 2014) (striking down on First Amendment grounds statute that criminalizes “any act of communicating . . . by mechanical or electronic means . . . with no legitimate . . . personal . . . purpose, with the intent to harass [or] annoy . . . another person”); see also Mary Anne Franks, “Revenge Porn” Reform: *A View from the Front Lines*, 69 Fla. L. Rev. 1251, 1287–88 (2017).

¹⁰⁶ See *Vivid Entm’t*, 774 F.3d at 578.

¹⁰⁷ See *id.* at 582.

¹⁰⁸ “When people permit their photograph to appear in a publication or advertisement, they typically consent to the publisher’s use of their image through a model release.” Jessica L. Williams-Vickery, *A (Thigh) Gap in the Law: Addressing Egregious Digital Manipulation of Celebrity Images*, 34 Ga. St. U. L. Rev. 795, 798 (2018).

¹⁰⁹ 17 U.S.C. §506.

not come close to stopping the countless ways in which people publicize their ideas, viewpoints, or feelings online. The First Amendment protects free-ranging, raucous, and often unpleasant and offensive debate. The First Amendment does not, however, protect the nonconsensual dissemination of nude or sexually explicit images that are deeply personal, never intended to be made public, and unrelated to matters of public concern.

D. Respondent’s arguments challenging Section 21.16(b) are all unavailing.

While this brief’s primary intent is to provide context to the Court on nonconsensual pornography, certain statements in the Respondent’s Brief require attention. First, the brief suggests Section 21.16(b) is addressed at preventing embarrassment. (Resp. Br. at 50) (“Mr. Jones is accused of embarrassing the complainant.”). CCRI’s research shows that nonconsensual pornography creates significantly more harm than mere embarrassment. For example, in their most recent study, researchers found that victims of nonconsensual pornography “had significantly worse mental health outcomes and higher levels of physiological problems (somatic symptoms) than non-victims.”¹¹⁰

Second, the Respondent flippantly writes that “photography does not steal one’s soul.” (Resp. Br. at 52). Section 21.16(b) does not outlaw photography. It criminalizes the distribution of sexually explicit photographs when the person depicted in the

¹¹⁰ Eaton, et al., *supra* note 21, at 23.

photographs has not given consent for that distribution. And, in CCRI's experience, such distribution does steal confidence, health, security, employment, education, dignity, and, in some instances, has led to suicide. These harms should not be minimized.

Third, Respondent asserts that "civil enforcement is a less-restrictive alternative to criminal prosecution for vindicating any state interest that might exist." (Resp. Br. at 52.) The claim that civil remedies can be constitutional where criminal remedies are not is not supported by First Amendment doctrine. If nonconsensual pornography is protected under the First Amendment, it should be no more permissible to restrict it using civil means than it is to using criminal means. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law. . . ." ¹¹¹

In any event, the assumption that the civil provision is not only constitutional, but less restrictive than the criminal provision, conflicts with the Supreme Court's indication in the opposite direction. The Court has noted that criminal statutes afford more safeguards to defendants than tort actions, suggesting that civil regulation of conduct raises First Amendment issues at least as serious as criminal regulation. ¹¹²

Civil protections are not, standing alone, sufficient to protect the state's

¹¹¹ *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964).

¹¹² *See id.* ("Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action.").

compelling interest in protecting the privacy of Texans. Civil actions are costly, time-consuming, and often result in greater invasions of the victim's privacy. Even those victims who are able to obtain legal representation and obtain favorable judgments are frequently faced with judgment-proof defendants.¹¹³ And successful civil actions cannot address the irreparable harm caused by nonconsensual pornography, as it is nearly impossible in most cases to completely remove images from the internet after the fact.¹¹⁴ As CCRI's study indicates, the only effective deterrent against this abuse is the threat of criminal penalties.

CONCLUSION

For these reasons, as well as the reasons set forth in the State's brief, CCRI asks that the Court of Criminal Appeals reverse the judgment of the Court of Appeals.

¹¹³ See Citron & Franks, *supra*, note 5, at 349. Civil actions require money, time, and resources that many victims simply do not have, and the chances of success are low.

¹¹⁴ Franks, *supra* note 105, at 1300.

Dated: January 16, 2019

Respectfully submitted,

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I certify that, on January 16, 2019, I served electronically a copy of this brief on counsel of record, as listed below:

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2017 NATIONWIDE ONLINE STUDY OF NONCONSENSUAL PORN VICTIMIZATION AND PERPETRATION

A SUMMARY REPORT

Dr. Asia A. Eaton, Dr. Holly Jacobs, and Yanet Ruvalcaba
June 2017

Cyber Civil Rights Initiative, Inc.
Florida International University, Department of Psychology

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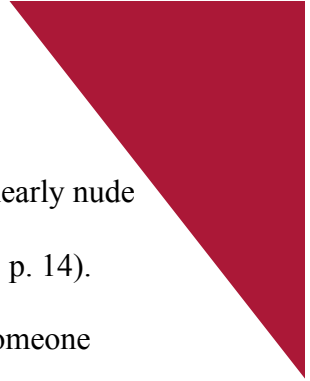
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I. Executive Summary

Digital sexual interactions have become increasingly prevalent in the last decade in the U.S. Sexting is common among young adults in the U.S., with about half of all young adults age 18-26 today having sent nude or seminude photos of themselves to others (Benotsch, Snipes, Martin, & Bull, 2012; Dir, Coskunpinar, Stiner, & Cyders, 2013; Drouin & Landgraff, 2012; Gordon-Messer, Bauermeister, Grodzinski, & Zimmerman, 2012) and two-thirds having received sexually-explicit photos of others (Dir et al., 2013). However, little is known about how digital communications are used in the perpetration of sexual violence or harassment among young adults (Henry & Powell, 2015).

Nonconsensual pornography (NCP) is a growing form of digital sexual violence (McGlynn, Rackley, & Houghton, 2017; Reed, Tolman, & Ward, 2016) defined as the distribution of sexually graphic images of individuals without their consent (also known as “revenge porn,” “cyber rape,” and “involuntary porn”; Citron & Franks, 2014). This includes images obtained without consent (e.g., hidden recordings) as well as images obtained and intended for a private or confidential relationship and later distributed beyond that relationship. While many state laws criminalize the viewing or recording of a person’s intimate parts without permission (Solove & Schwartz, 2013), or the disclosure of records containing individually-identifying information (5 U.S.C. § 552), not all ban NCP.


To date, published studies on the prevalence, correlates, and consequences of NCP are lacking. In late 2016, Lenhart and colleagues published a data memo describing, for the first time, the prevalence of NCP victimization in the U.S. (Lenhart et al., 2016). Using a nationally-representative sample of 3,002 internet users age 15 or older living in the U.S., these researchers conducted phone-based interviews asking participants about their experience with a variety of



forms of “cyberabuse,” including whether anyone had ever threatened to or did “post nearly nude or nude photos or videos of you online to harm or embarrass you” (Lenhart et al, 2016, p. 14). Results of this research found that 4% of all participants, or about 1 of every 25, had someone threaten to post and/or post sexually-explicit images of them without their consent. However not all nonconsensual porn is perpetrated with the explicit intent to “...harm or embarrass...” as was stipulated in the question prompt from Lenhart and colleagues (2016). Indeed, the multiple potential motivations behind the perpetration of NCP, which can range from bragging, to arousal, to amusement, is why researchers have moved away from using the term “revenge porn” and now use the term “nonconsensual porn” (Franks, 2017).

Politicians, government agencies, and advocacy groups desperately need more meaningful data on NCP prevalence, risk factors, consequences, and experiences for their efforts on behalf of the American public, and are therefore calling for systematic research on nonconsensual porn. For example, Senator Franken of the Senate Subcommittee on Privacy, Technology and the Law wrote to the Federal Bureau of Investigation in 2015 expressing concern about limitations in the law around “revenge porn,” and requesting a detailed breakdown of the Bureau's plans to fight nonconsensual porn (Geller, 2015). The American Civil Liberties Union (ACLU) and other free-speech groups have also asked for a broad examination of the state laws around nonconsensual porn for the purpose of more systematic and targeted legislation (Rugg, 2015). These appeals are congruent with and inspired by the nation’s current efforts to prevent and address violence-related behaviors that harm people and tax the legal system.

The present study is the *first ever* nation-wide study to profile the rates of nonconsensual pornography victimization and perpetration, including motives for perpetration, deterrents to




perpetration, and health outcomes for victims. This document is a summary report of the study methods and a subset of aggregated results from participants.

II. Survey Creation and Administration

The 2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration was conducted by the Research Team at the Cyber Civil Rights Initiative, including Drs. Asia Eaton, Holly Jacobs, Dionne Stephens, Amy Bonomi, Tameka Gillum, and Ph.D. student Yanet Ruvalcaba, with support from Natalie Webb, CCRI's Communications and Digital Media Director. The study survey was constructed using input from experts in survey and questionnaire design, intimate partner violence and sexual abuse, criminal law, and victim support services. Participants were asked about their lifetime experience with nonconsensual pornography, both as perpetrators and victims, their health, motives for and consequences of their perpetration and victimization, respectively, and a number of demographic questions.

The 2017 Nationwide Online Study of Nonconsensual Porn was open to participants from November 2016 through March 2017 on the social media platform Facebook. Adult participants (age 18 and older) were recruited using Facebook advertisements with copy such as "Help us understand more about what American think about sharing nude images online. Take our survey and voice your opinion." Images that accompanied the advertisement copy were non-sexual in nature, and included images of computer screens, mail envelopes, and raised hands or simple, colorful geometric designs with one line descriptors such as "Share Your Opinion" or "Your Opinion Matters." See the Appendix for four examples of advertisements.

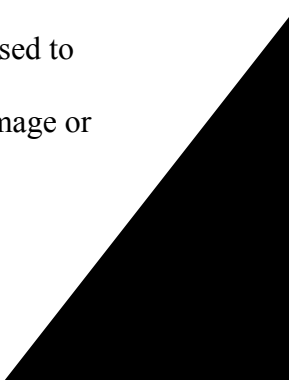
Three thousand forty-four adult participants were recruited using a stratified sampling technique in which advertisements were shown to equal numbers of men and women in each of the 50 states in the U.S. proportional to the representation of each state in the total population of the nation. For example, the data from the 2016 U.S. Census estimated that 3.99% of the U.S. population resides in Illinois. Therefore, using Facebook analytics, we recruited 4% of our




sample of 3,044 participants from the state of Illinois, and ceased data collection for this state once that quota was reached. Our respondents, however, do not constitute a nationally-representative sample of U.S. adults, making generalizations beyond this sample inappropriate. For instance, our findings cannot be applied to individuals who do not use the internet, or who do not have Facebook accounts. Though, considering researchers have found that 87% of all Americans use the internet (Anderson & Perrin, 2016), and of these 71% use Facebook (Duggan, Ellison, Lampe, Lenhart, & Madden, 2015), participants in our sample do reflect the typical characteristics of a large number of U.S. adults.

Eligibility criteria for participants included being 18 years of age or older and residing in the U.S. Two checks were implemented to help ensure the accuracy of participants' self-reports on these two eligibility criteria. To ensure participants were age 18 or older, we asked participants to report their birth year immediately upon starting the survey and again at the end of the survey. Participants whose birth years at both points did not match, or who had one birth year that indicated they were under age 18, were excluded from analyses. To ensure participants were living in a particular U.S. state, we used Facebook analytics to target individuals whose self-reported profiles indicated living in a U.S. state, as well as asking participants to report their state of residence in the survey.

Unlike some previous surveys of cyber harassment or abuse, which looked exclusively at rates of “revenge porn” (aka the non-consensual dissemination of sexually-explicit images for the purpose of harming or exacting revenge on the victim), this survey examined all forms of NCP victimization and perpetration in this population. We aimed to capture the NCP rates of any kind, in any context, spurred by any motives. For this reason, the primary question we used to assess victimization was broad, and read: “Has anyone ever shared a sexually-explicit image or






video of you without your consent?” We further clarified these terms as follows: “by ‘sexually-explicit’ we mean images or videos of full or partial nudity, or of sexual acts (such as penetration/intercourse, oral sex, masturbation, and the use of sexual toys). Sharing could include distributing or uploading images or videos via email, text message, social media, apps, websites, DVDs, or printed photos. This does NOT include commercially-distributed pornography.” Those who did not report having their images shared were also asked “Has anyone ever threatened to share a sexually-explicit image or video of you without your consent?” All individuals were additionally asked whether they had ever perpetrated NCP using the question: “Have you ever knowingly shared a sexually-explicit image or video of someone without his/her consent?”

Study materials and procedure were approved by the Institutional Review Board at Florida International University (FIU) to ensure adequate protection of human subjects in research. Participation was entirely voluntary, as outlined in a consent form proceeding the survey items, and participants did not receive compensation for their effort. No identifying information on participants was collected, making the surveys completely anonymous, with the exception of a small subset of individuals who gave their email addresses and volunteered to be contacted about future studies. At the end of the survey, all participants were directed to a host of online and offline resources related to NCP and sexual violence.

II. Participant Characteristics

Total participants (N) = 3,044	
Gender	46.2% male ($n = 1,405$) 53.8% female ($n = 1,639$)
Ethnicity	82% White ($n = 2,499$) 8.2% selected multiple ethnic categories ($n = 250$) 3.4% selected “other” ($n = 104$) 2% Hispanic ($n = 66$) 1.3% African American ($n = 40$) 1.2% Asian ($n = 36$) 0.8% Alaskan Native/Native American ($n = 25$) 0.3% Middle Eastern ($n = 9$) 0.07% Native Hawaiian or Pacific Islander ($n = 2$) 0.4% missing ($n = 13$)
Nationality	98.8% U.S. Citizen ($n = 3,006$) 0.9% non-U.S. Citizen ($n = 28$) 0.3% Missing ($n = 10$)
Age	$M = 40.31$ ($SD = 19.02$) Range = 18-97
Sexual orientation	70.4 heterosexual ($n = 2,138$) 7.5% gay or lesbian ($n = 228$) 16.5% bisexual ($n = 501$) 5.7% other ($n = 172$) 0.2% missing ($n = 5$)
Education	2.1% Some high school ($n = 63$) 13.4% High school graduate ($n = 407$) 39% Presently in college; 1 st -6 th year ($n = 1,198$) 8% Associates degree ($n = 253$) 16.7% Bachelor's degree ($n = 507$) 6% Completed some postgraduate ($n = 184$) 8.6% Master's degree ($n = 263$) 3% Doctorate, law, or medical degree ($n = 92$) 0.5% Other advanced degree beyond a Master's degree ($n = 14$) 2% Other ($n = 61$)
Annual Income	25.5% “Less than \$10,000” ($n = 776$) 15.1% “\$10,000 - \$19,999” ($n = 460$) 12.7% “\$20,000 - \$29,999” ($n = 386$) 11.2% “\$30,000 - \$39,999” ($n = 341$) 9.1% “\$40,000 - \$49,999” ($n = 276$)



	11.1% “\$50,000 - \$74,999” ($n = 338$)
	7.1% “\$75,000 - \$99,999” ($n = 215$)
	4% “\$100,000 - \$149,999” ($n = 123$)
	2.5% “\$150,000 or more” ($n = 77$)
	1.7% Missing ($n = 52$)

IIV. Key Findings

A. Overall victimization, threat, and perpetration rates

1. **Victimized or threatened with NCP.** 12.8% of all participants reported having been victims of NCP (having had a sexually-explicit image of themselves shared without their consent) or having been *threatened* with NCP.
2. **NCP Victims.** 8% of all participants reported having been victims of NCP (having had a sexually-explicit image of themselves shared without their consent) at some point in their lives.
3. **Only threatened with NCP.** 4.8% of all participants reported having only been *threatened* with NCP, *without it ever being distributed*.
4. **NCP Perpetrators.** 5.2% of all participants reported having perpetrated NCP (having shared a sexually-explicit image of someone without their consent) at some point in their lives.

	Yes	No
1. Has anyone ever shared or threatened to share a sexually-explicit image or video of you without your consent?	12.8% (389/3044)	87.2% (2655/3044)
2. Has anyone ever shared a sexually-explicit image or video of you without your consent?	8% (244/3044)	92% (2800/3044)
3. Has anyone ever <i>threatened</i> to share sexually-explicit image or video of you without your consent, <i>without it ever being distributed</i> ?	4.8% (145/3044)	95.2% (2899/3044)
4. Have you ever knowingly shared a sexually-explicit image or video of someone without his/her consent?	5.2% (159/3044)	94.8% (2885/3044)

B. Gender Differences

1. **Victimized or threatened with NCP by gender.** 12.8% of all participants ($n = 389/3044$) reported having been victims of NCP (having had an image of them shared without their consent) or having been *threatened* with NCP. Women were significantly more likely (about 1.7 times as likely) to have been victims of NCP or to have been threatened with NCP compared to men, with 15.8% of all women reporting having been victimized or threatened vs. 9.3% of men across all age groups.

		Participant gender		Total
		Male	Female	
Has anyone ever shared a sexually-explicit image or video of you without your consent?	No	Count	1275	1380
		% within participant gender	90.7%	84.2%
<u>or</u> Has anyone ever <i>threatened</i> to share a sexually-explicit image or video of you without your consent?	Yes	Count	130	259
		% within participant gender	9.3%	15.8%
Total		Count	1405	1639
		% within participant gender	100.0%	100.0%

B. Gender Differences (contd.)

2. **NCP Victims by gender.** 8% of all participants ($n = 244/3044$) reported having been victims of NCP (having had an image of them shared without their consent)¹ at some point in their lives. Women were significantly more likely (about 1.5 times as likely) to report having been victims than men, with 9.2% of all women reporting victimization vs. 6.6% of men across all age groups.

		Participant gender		Total
		Male	Female	
Has anyone ever shared a sexually-explicit image or video of you without your consent?	No	Count	1312	1488
		% within participant gender	93.4%	90.8%
	Yes	Count	93	151
		% within participant gender	6.6%	9.2%
Total		Count	1405	1639
		% within participant gender	100.0%	100.0%

¹ Of the 244 victims, 66 (27%) said they were under age 18 at the time the image(s) was taken. Most of those 66 participants were between the ages of 15 and 17 at the time the image(s) was captured (76%; 50/66).

B. Gender Differences (contd.)

3. **Only threatened with NCP by gender.** 4.8% of all participants ($n = 145/3044$) reported having only been *threatened* with NCP, *without it ever being distributed*. Women were significantly more likely (about 2.5 times as likely) to have been threatened with NCP than men, with 6.6% of all women reporting having been threatened vs. 2.6% of men across all age groups.

			Participant gender		Total
			Male	Female	
Has anyone ever <i>threatened</i> [only] to share a sexually-explicit image or video of you without your consent?	No	Count	1368	1531	2899
		% within participant gender	97.4%	93.4%	95.2%
	Yes	Count	37	108	145
		% within participant gender	2.6%	6.6%	4.8%
Total		Count	1405	1639	3044
		% within participant gender	100.0%	100.0%	100.0%

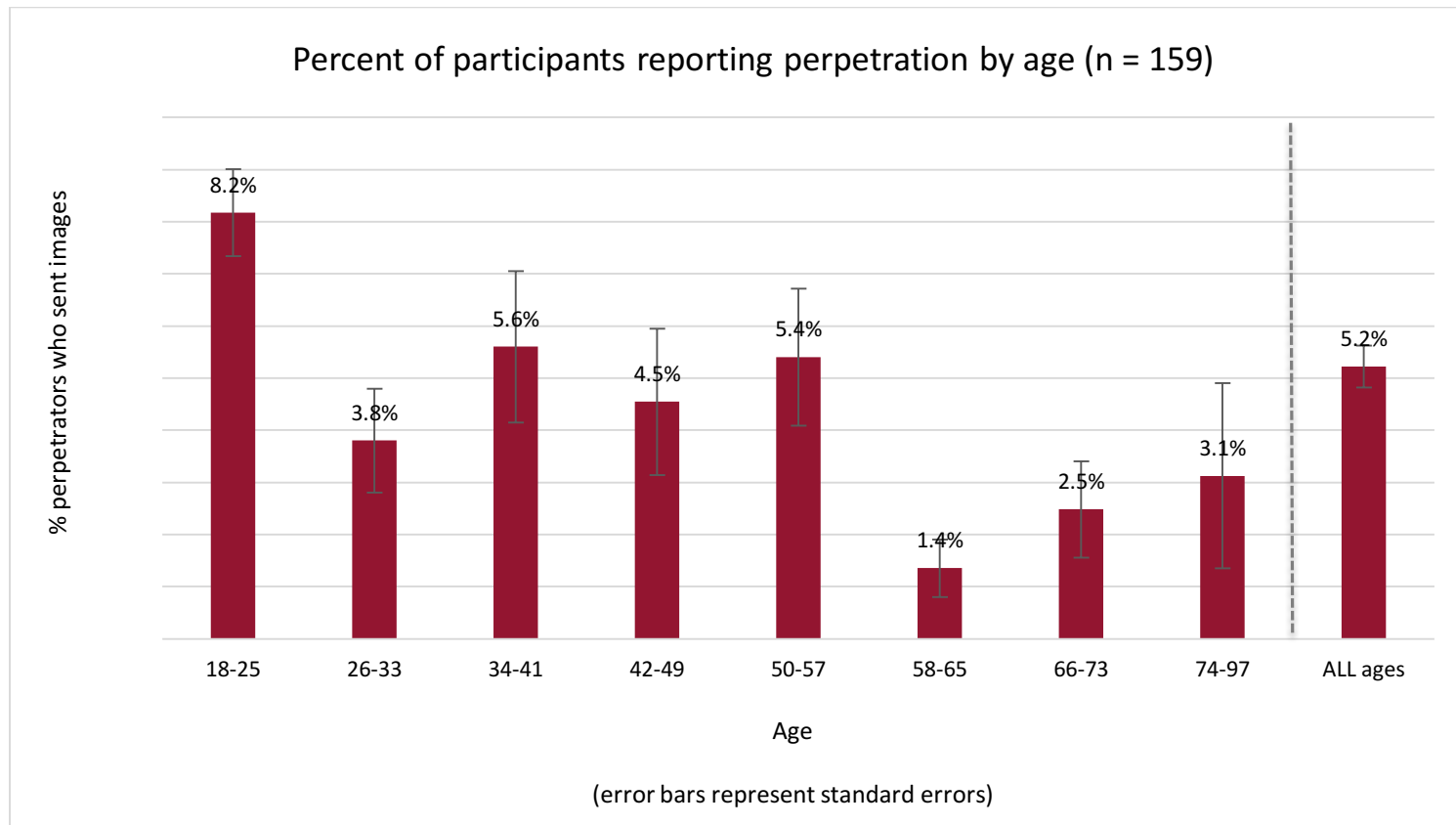
B. Gender Differences (contd.)

4. **NCP Perpetrators by gender.** 5.2% of all participants ($n = 159/3044$) reported having perpetrated NCP (having shared a sexually-explicit image of someone without their consent) at some point in their lives. Men were significantly more likely (twice as likely) to report having been perpetrators of than women, with 7.4% of all men participants reporting perpetration vs. 3.4% of all women across age groups.

		Participant gender		Total
		Men	Women	
Have you ever knowingly shared a sexually-explicit image or video of someone without his/her consent?	No	Count	1301	2885
		% within participant gender	92.6%	94.8%
	Yes	Count	104	159
		% within participant gender	7.4%	5.2%
Total		Count	1405	3044
		% within participant gender	100.0%	100.0%

C. Age Differences

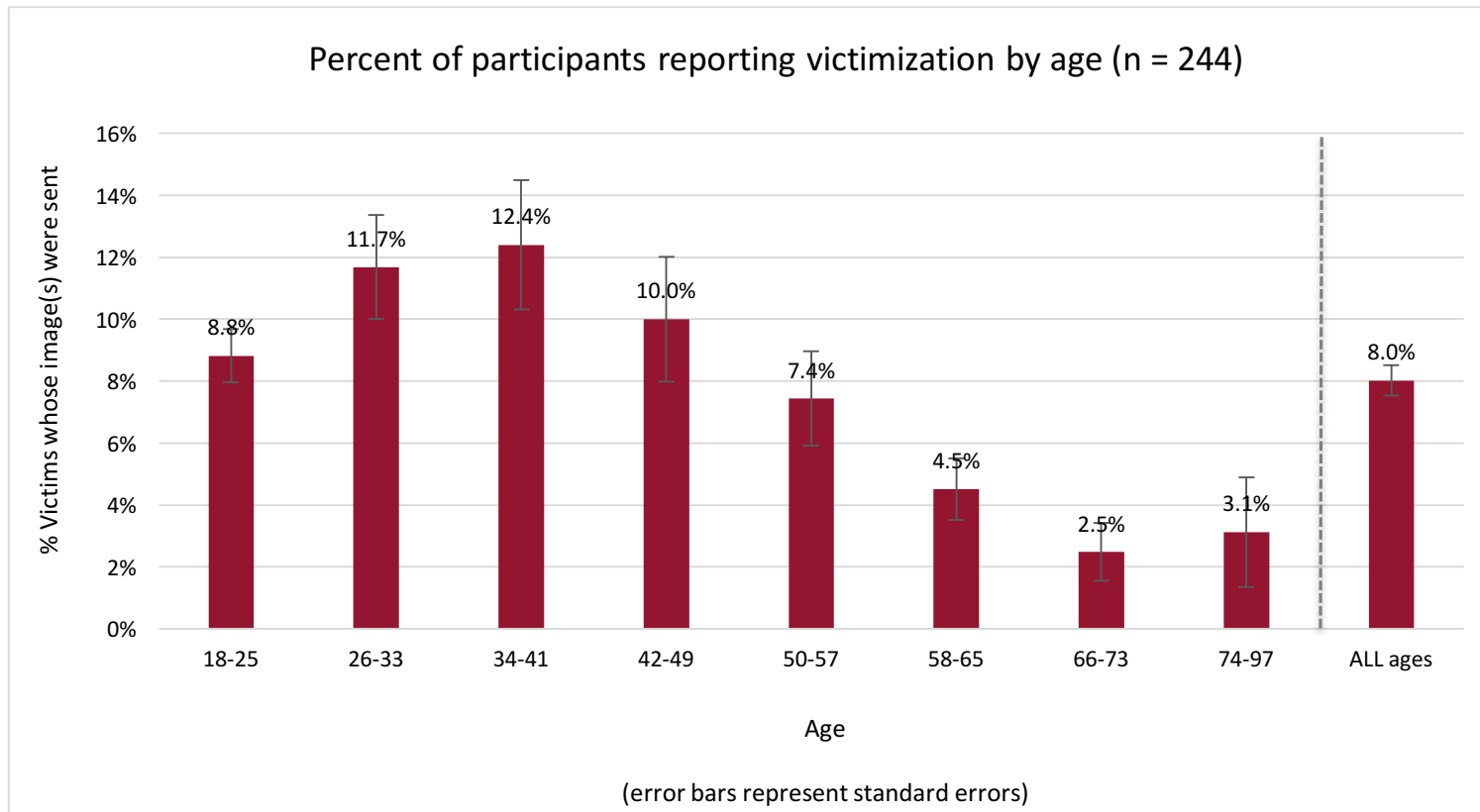
1. **Perpetration by age.** Participants between the ages of 18-25 reported the highest levels of NCP perpetration compared to other age groups, with 8.2% of participants in this age group reporting having shared sexually-explicit images of another person(s) without consent at some point in their lives.²



² The age distribution for participants was skewed, with very few participants age 74 and older in the sample ($n = 96$)

C. Age Differences (contd.)

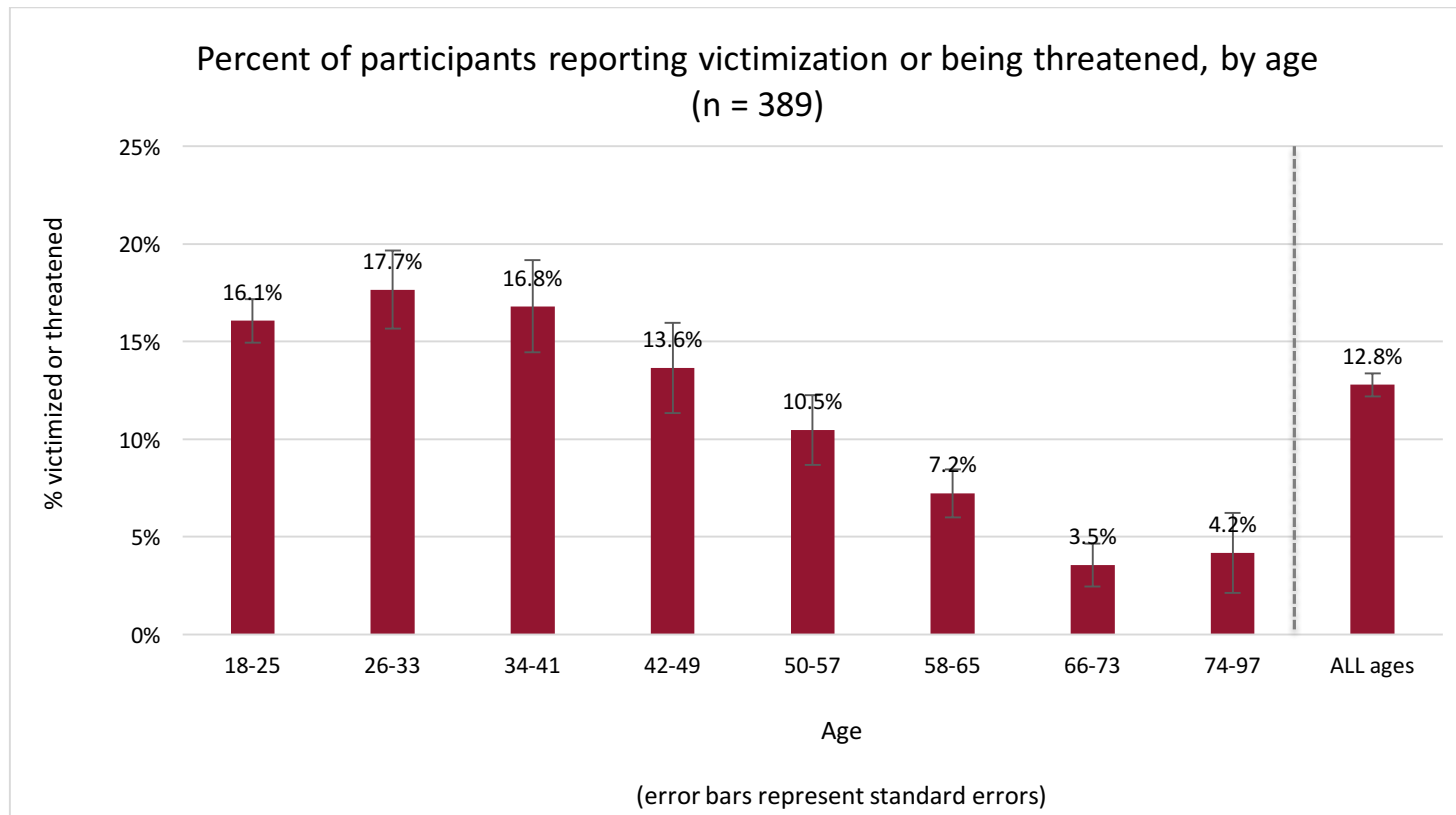
2. **Victimization by age.** Participants between the ages of 34-41 reported the highest levels of lifetime NCP victimization compared to other age groups, with 12.4% of participants in this age group reporting having been victims of NCP at some point in their lives.³



³ The age distribution for participants was skewed, with very few participants age 74 and older in the sample ($n = 96$)

C. Age Differences (contd.)

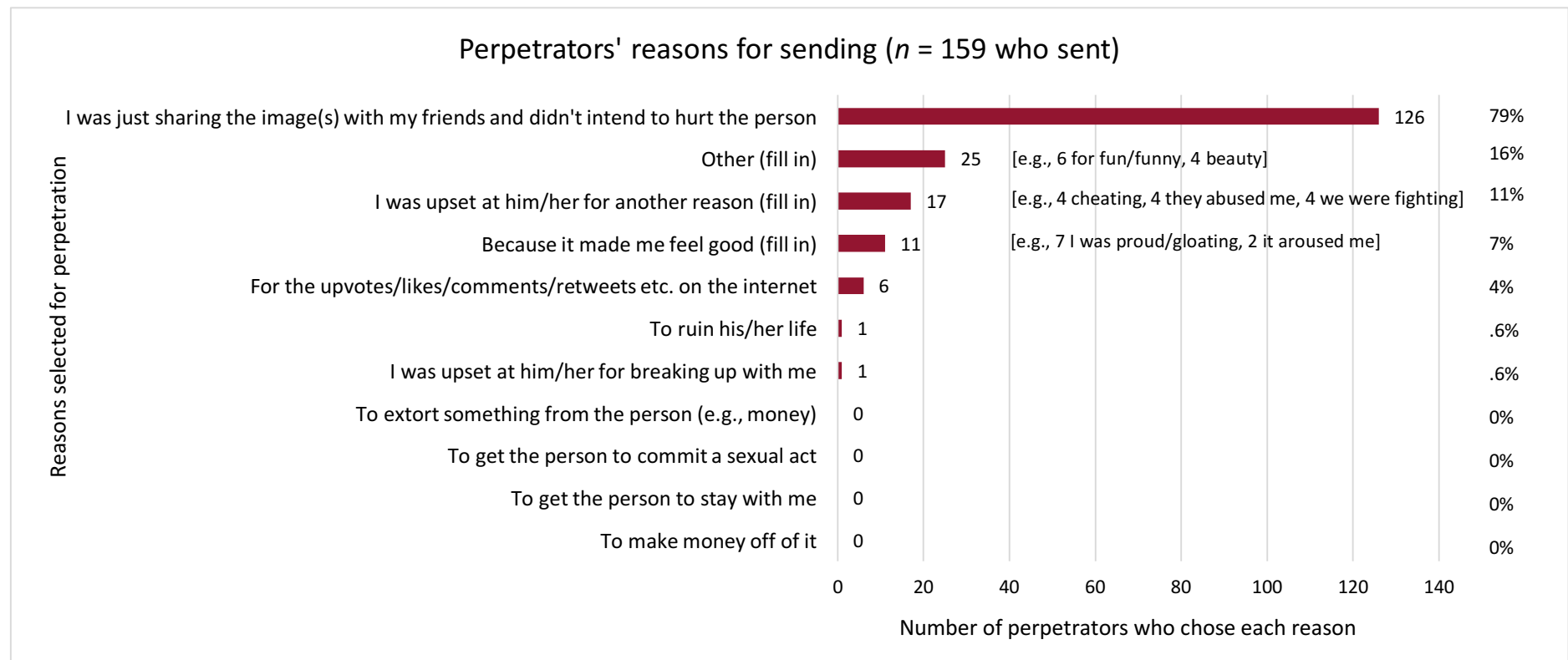
3. **Victimized or threatened with NCP by age.** Participants between the ages of 26-33 reported the highest levels of lifetime victimization or being threatened with NCP compared to other age groups, with 17.7% of participants in this age group reporting having been victimized by or threatened with NCP at some point in their lives.⁴



⁴ The age distribution for participants was skewed, with very few participants age 74 and older in the sample ($n = 96$)

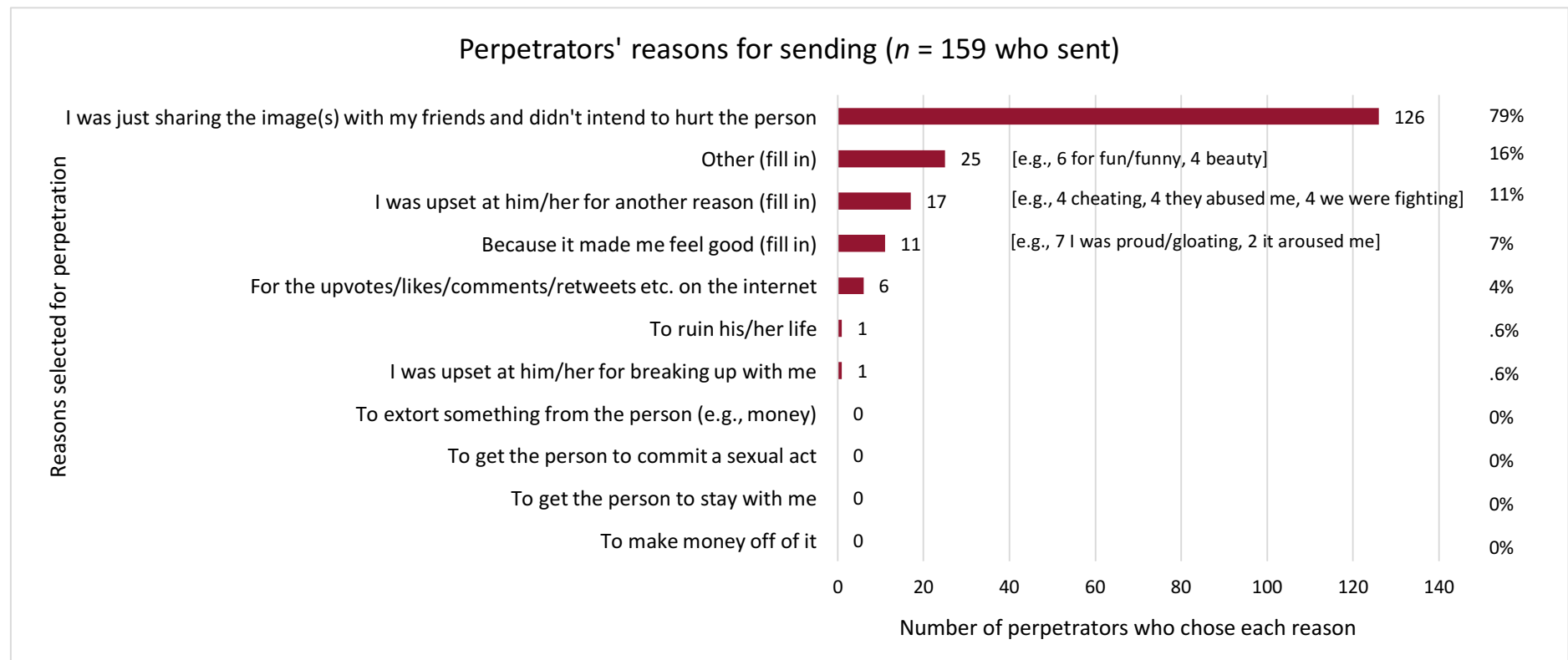
D. Perpetrator Motives

Of the 159 individuals who reported having perpetrated NCP by sharing sexually-explicit images of another person without his/her consent (5.2% of the entire sample, 159/3044), the most commonly chosen reason for perpetration was just to share “with friends” without the intention “to hurt” the person (79% of all self-identified perpetrators selected this option). Only 12% of perpetrators reported having committed NCP because they were upset with the victim and/or wanted to harm them. Participants were permitted to choose multiple reasons for having sent the image(s), though most chose only one reason ($M = 1.18$, $SD = 0.44$).



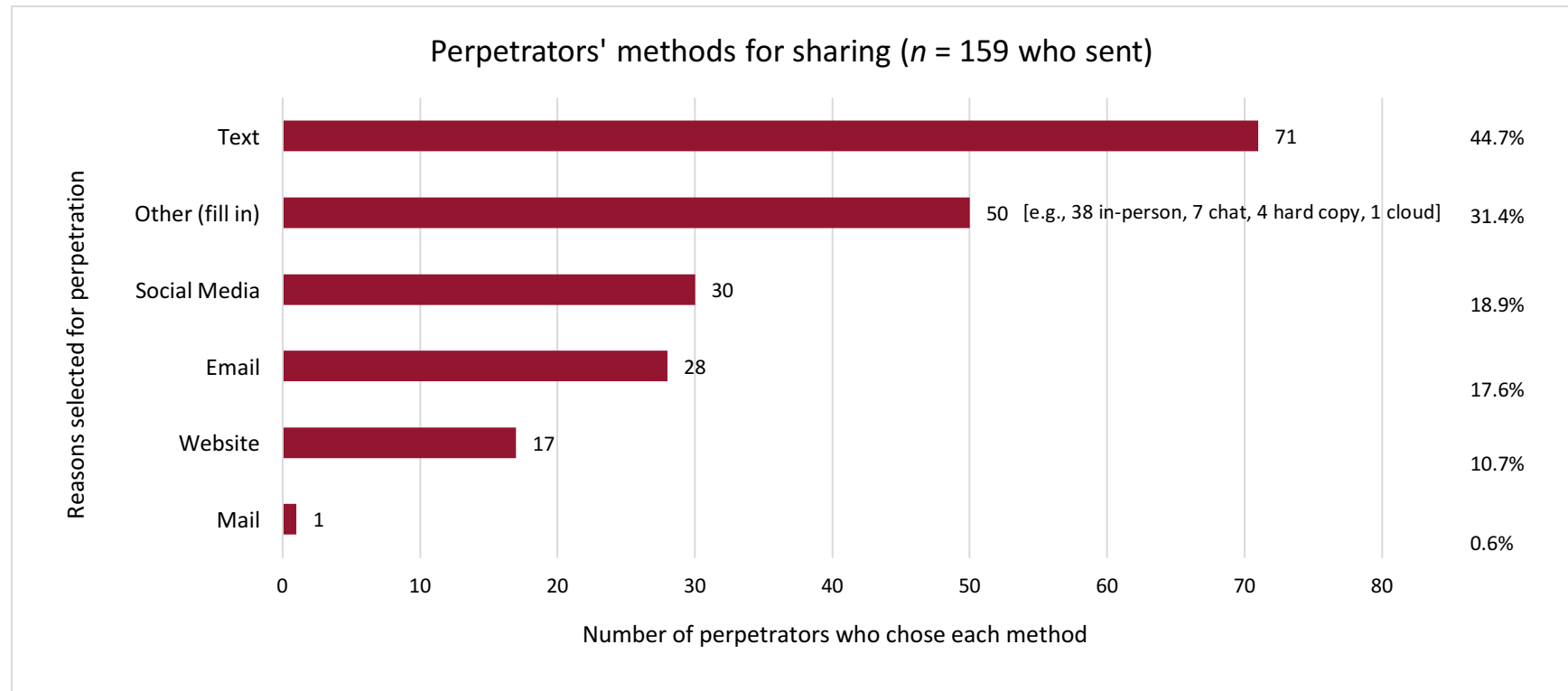
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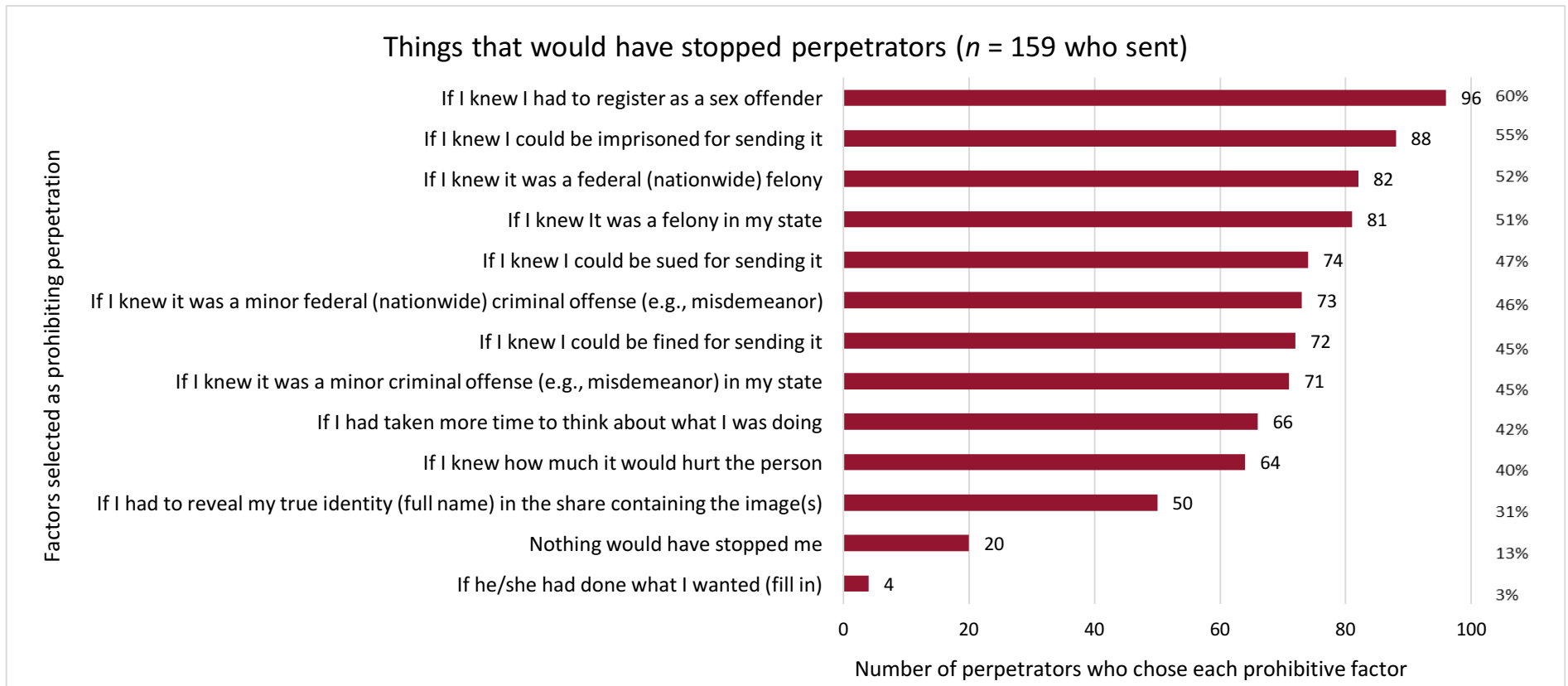
E. Perpetrator Methods

Of the 159 individuals who reported having perpetrated NCP by sharing images (5.2% of the entire sample, 159/3044), the most commonly chosen method for sharing the image(s) was via text message (44.7% of all perpetrators reported having used this method). The second most common method was “other” (31.4% of perpetrators selected this option) with most of this category representing in-person sharing. Participants were permitted to choose multiple methods for sharing, and most chose only one method ($M = 1.24$, $SD = 0.57$).



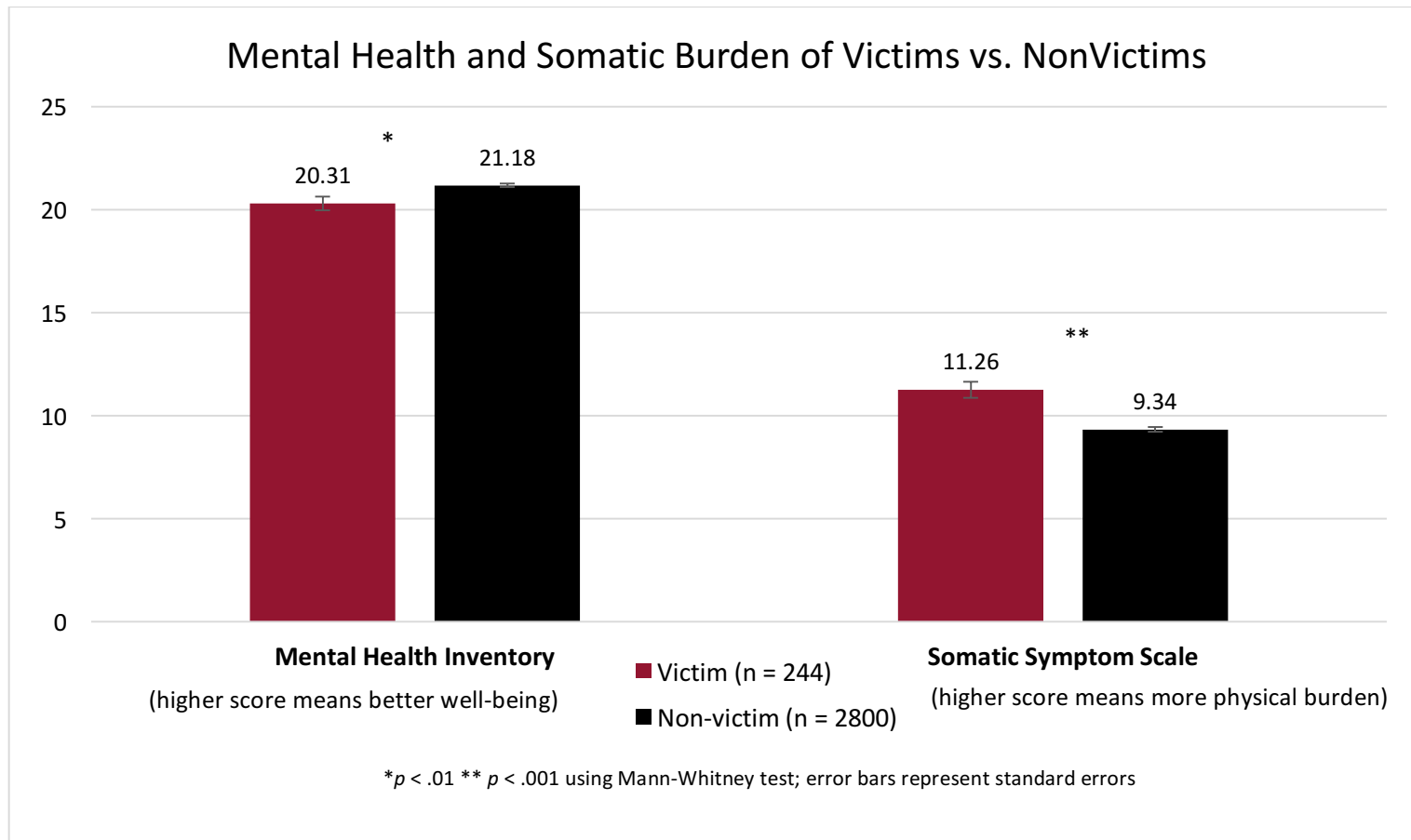
F. Perpetrator Sanctions

Of the 159 individuals who reported having perpetrated NCP by sharing images (5.2% of the entire sample, 159/3044), the most commonly chosen prohibitive factor participants chose in response to the question “What might have stopped you from sharing the image(s)?” was if they knew they had to register as a sex offender (with 60% of all perpetrators selecting this reason). Participants were permitted to choose multiple factors that would have stopped them, and most chose about five ($M = 4.88$, $SD = 3.85$).



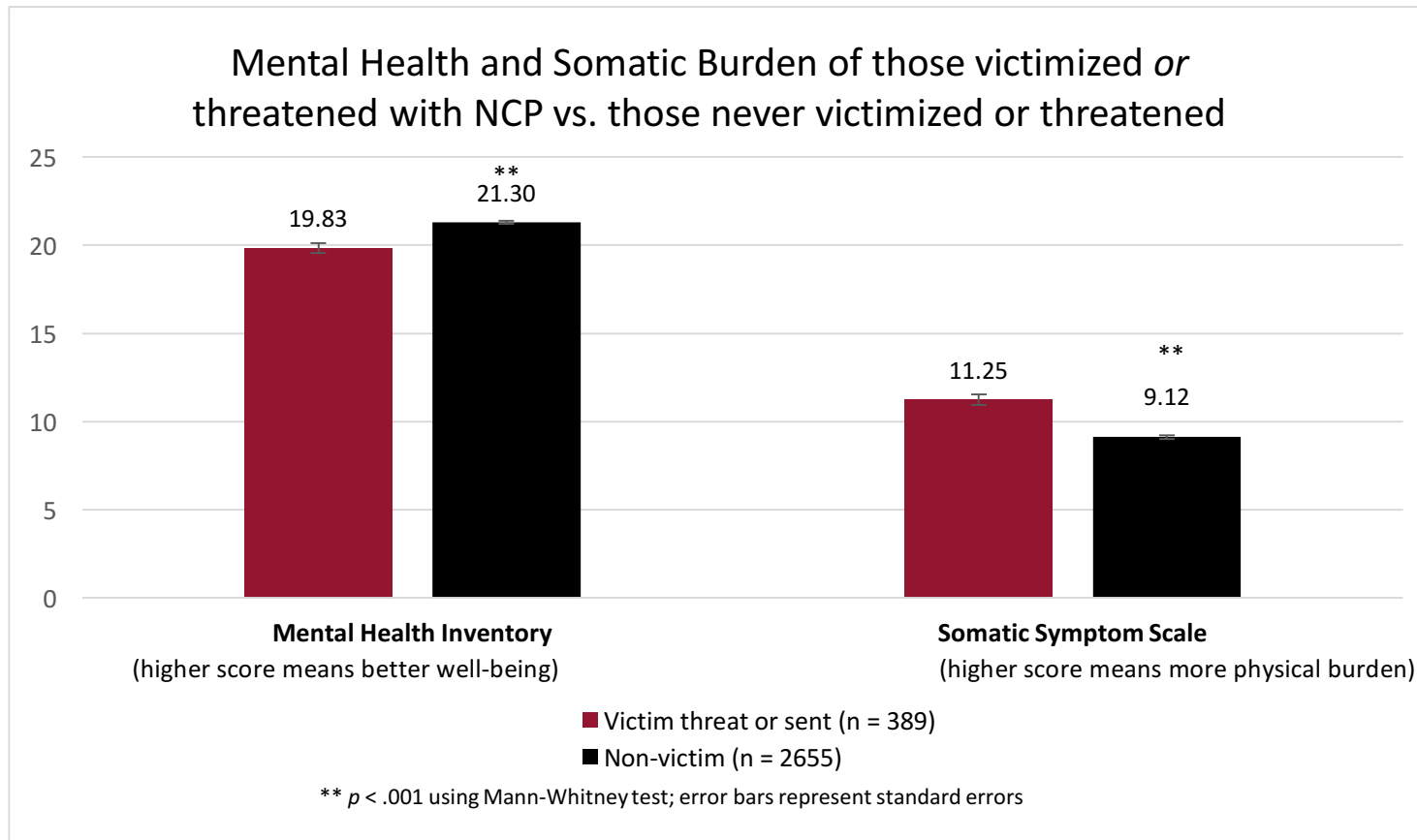
G. Health Outcomes

1. **Victims vs. NonVictims.** Those who reported having had their sexually-explicit image(s) shared without their consent at least once ($n = 244/3044$) had significantly worse mental health outcomes and higher levels of physiological problems (i.e., somatic symptoms) than non-victims ($n = 2800/3044$) as measured by the Mental Health Inventory 5-item Scale (MHI-5; Berwick et al., 1991) and the Somatic Symptom Scale-8 (SSS-8; Gierk et al., 2015), respectively.



G. Health Outcomes (contd.)

2. **Health for those victimized or threatened with NCP vs. those never victimized or threatened.** Those who reported having had their sexually-explicit image(s) shared without their consent or having been threatened with the sharing of their images without consent ($n = 389/3044$) had significantly worse mental health outcomes and higher levels of physiological problems (i.e., somatic symptoms) than non-victims ($n = 2655/3044$) as measured by the Mental Health Inventory 5-item Scale (MHI-5; Berwick et al., 1991) and the Somatic Symptom Scale-8 (SSS-8; Gierk et al., 2015), respectively.



V. References

5 U.S.C. § 552(a)(i)(1) (2012)

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VI. Appendix

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